

***United States Court of Appeals
for the Second Circuit***

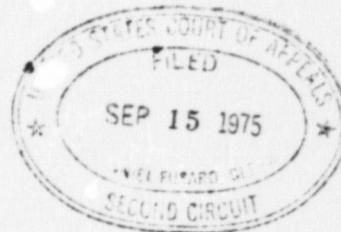


APPENDIX

75-7386

IN THE
United States Court of Appeals
For the Second Circuit

75-7386



IN RE MASTER KEY ANTITRUST LITIGATION
(All Cases)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
JOINT APPENDIX
VOLUME ONE

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DATE

February 3, 1970	<u>Complaint in City of Philadelphia et al. v. Emhart Corp., et al. (E.D. Pa.).</u>
February 20, 1970	<u>Complaint in Amherst Leasing Corp., et al. v. Emhart Corp. et al. (E.D. Pa.).</u>
March 12, 1970	<u>Complaint in State of Connecticut et al. v. Eaton, Yale & Towne, Inc., et al. (N.D. Ill.).</u>
June 10, 1970	<u>Complaint in State of Indiana et al. v. Eaton, Yale & Towne, Inc., et al. (N.D. Ill.).</u>
June 10, 1970	<u>Complaint in City of New York et al. v. Emhart Corp., et al. (S.D.N.Y.).</u>
June 23, 1970	<u>Order conditionally certifying classes in City of Philadelphia and Amherst Leasing Corp. actions (Wood, J.).</u>
September 23, 1970	<u>Complaints in State of Florida v. Emhart Corp., et al., Bermar Construction Corp. v. Emhart Corp. et al. (S.D. Fla.).</u>
September 25, 1970	<u>Complaint in State of New York v. Emhart Corp., et al. (S.D.N.Y.).</u>
November 12, 1970	<u>Complaint in Commonwealth of Pennsylvania et al. v. Eaton, Yale & Towne, Inc., et al. (N.D. Ill.).</u>
November 23, 1970	Opinion and Order of the U.S.D.C., N.D. Illinois, transferring the <u>State of Connecticut and State of Indiana actions to the District of Connecticut pursuant to 28 U.S.C. §1404 (a); original papers filed including separate Answers of each defendant to the State of Connecticut Complaint.</u>

DATE

December 18, 1970	Opinion and Order of the U.S.D.C., N.D. Illinois, transferring the <u>Commonwealth of Pennsylvania</u> action to the District of Connecticut pursuant to 28 U.S.C. §1404 (a); original papers filed.
January 14, 1971	Order of the J.P.M.L. transferring the <u>City of Philadelphia, Amherst Leasing Corp., City of New York, State of Florida, Bermar Construction Corp., and State of New York</u> actions to the District of Connecticut pursuant to 28 U.S.C. §1407.
January 26, 1971	Original papers in the <u>City of New York and State of New York</u> actions filed in the District of Connecticut, including separate Answers of each defendant in each of those actions.
January 28, 1971	Original papers in the <u>City of Philadelphia and Amherst Leasing Corp.</u> actions filed in the District of Connecticut, including separate Answers of each defendant in each of those actions.
January 29, 1971	Original papers in the <u>State of Florida and Bermar Construction Corp.</u> actions filed in the District of Connecticut, including separate Answers of each defendant in each of those actions.
February 1, 1971	Complaint in <u>Sturdy Homes Company, et al. v. Eaton, Yale & Towne, Inc., et al. (E.D. Mich.)</u> .
March 3, 1971	Conditional Transfer Order in the <u>Sturdy Homes Company</u> action.
April 1, 1971	Complaint in <u>State of Ohio v. Eaton, Yale, & Towne, Inc., et al. (S.D. Ohio)</u> .
April 7, 1971	Complaint in the <u>Sturdy Homes Company</u> action filed in the District of Connecticut.
April 26, 1971	Separate Answer of Defendant, <u>Ilco Corp.</u> , in the <u>Sturdy Homes Company</u> action.

DATE

May 4, 1971	Conditional Transfer Order in the <u>State of Ohio</u> action.
May 13, 1971	Complaint in the <u>State of Ohio</u> action filed in the District of Connecticut.
May 17, 1971	Separate Answers of Defendant, Emhart Corp., in the <u>State of Indiana</u> and <u>Commonwealth of Pennsylvania</u> actions.
May 17, 1971	Separate Answers of Defendant, Eaton Corp., in the <u>Sturdy Homes Company</u> and <u>State of Ohio</u> actions.
May 27, 1971	Separate Answer of Defendant, Ilco Corp., in the <u>State of Ohio</u> action.
June 7, 1971	Separate Answers of Defendant, Sargent & Co., in the <u>Commonwealth of Pennsylvania</u> , <u>Sturdy Homes Company</u> , and <u>State of Ohio</u> actions.
June 15, 1971	Separate Answers of Defendant, Emhart Corp., in the <u>Sturdy Homes Company</u> and <u>State of Ohio</u> actions.
June 17, 1971	Separate Answer of Defendant, Sargent & Co., in the <u>State of Indiana</u> action.
June 24, 1971	Complaint in the <u>State of Kansas v. Eaton, Yale, & Towne, Inc., et al.</u> (D. Kan.).
July 22, 1971	Conditional Transfer Order in the <u>State of Kansas</u> action.
July 29, 1971	Complaint in the <u>State of Kansas</u> action filed in the District of Connecticut.
August 2, 1971	Separate Answer of Defendant, Ilco Corp., in the <u>State of Kansas</u> action.
August 9, 1971	Separate Answer of Defendant, Emhart Corp., in the <u>State of Kansas</u> action.
September 1, 1971	Separate Answer of Defendant, Eaton Corp., in the <u>Commonwealth of Pennsylvania</u> action.

DATE

November 5, 1971	Separate Answers of Defendant, Ilco Corp., in the <u>State of Indiana and Commonwealth of Pennsylvania</u> actions.
November 29, 1971	Separate Answer of Defendant, Eaton Corp., in the <u>State of Kansas</u> action.
January 31, 1972	Separate Answer of Defendant, Sargent & Co., in the <u>State of Kansas</u> action.
February 29, 1972	Complaint in <u>State of West Virginia v. Eaton, Yale & Towne, Inc., et al. (N.D. Ill.)</u> .
April 21, 1972	Order transferring <u>State of West Virginia</u> action to the District of Connecticut.
May 4, 1972	Separate Answer of Defendant, Ilco Corp., in the <u>State of West Virginia</u> action.
May 12, 1972	Complaint in the <u>State of West Virginia</u> action filed in the District of Connecticut.
June 5, 1972	Separate Answer of Defendant, Emhart Corp., in the <u>State of West Virginia</u> action.
July 11, 1972	Complaint in <u>State of Illinois, et al. v. Eaton, Yale & Towne, Inc., et al. (N.D. Ill.)</u> .
August 11, 1972	Conditional Transfer Order in the <u>State of Illinois</u> action.
August 11, 1972	Separate Answer of Defendant, Ilco Corp., in the <u>State of Illinois</u> action.
January 4, 1973	Separate Answer of Defendant, Sargent & Co., in the <u>State of Illinois</u> action.
January 5, 1973	Separate Answer of Defendant, Sargent & Co., in the <u>State of West Virginia</u> action.

DATE

January 16, 1973	Plaintiffs' Memorandum in Support of all Class Actions, with proposed Order attached.
January 29, 1973	Separate Answer of Defendant, Emhart Corp., in the <u>State of Illinois</u> action.
February 15, 1973	Separate Memorandum of Defendant, Emhart Corp., regarding Distribution of Builders Hardware, with affidavit attached thereto.
February 15, 1973	Memorandum of Sargent & Co. in Opposition to Certification of Classes, with affidavits attached thereto.
February 16, 1973	Motion of All Defendants for Summary Judgment.
February 16, 1973	Statement of Facts of Defendant, Eaton Corp., with affidavit attached thereto.
February 21, 1973	Statement of Facts of Defendant, Ilco Corp.
February 23, 1973	Separate Answer of Defendant, Eaton Corp. in the <u>State of Illinois</u> action.
February 26, 1973	Separate Answer of Defendant, Eaton Corp., in the <u>State of West Virginia</u> action.
March 15, 1973	Complaint, Amended Complaint, and Conditional Transfer Order in <u>State of New Jersey v. Emhart Corp., et al.</u> , filed in the District of Connecticut.
March 22, 1973	Separate Answer of Defendant, Eaton Corp., in the <u>State of New Jersey</u> action.
April 2, 1973	Separate Answer of Defendant, Ilco Corp., in the <u>State of New Jersey</u> action.

DATE

April 23, 1973	Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, with Affidavits in Support Thereof.
April 25, 1973	Complaint in <u>State of California v. Emhart Corp., et al.</u> (C.D. Cal.).
April 26, 1973	Memorandum of City of New York in Opposition to Defendants' Motion for Summary Judgment.
May 9, 1973	Supplemental Memorandum in Opposition to Defendants' Joint Motion for Summary Judgment.
May 14, 1973	Separate Answer of Defendant, Emhart Corp., to Amended Complaint in the <u>State of New Jersey</u> action.
May 25, 1973	Supplemental Memorandum of the State of Ohio in Opposition to Defendants' Motion for Summary Judgment.
June 4, 1973	Conditional Transfer Order and Complaint in the <u>State of California</u> action filed in the District of Connecticut.
June 4, 1973	Defendants' Reply Memorandum in Support of Joint Motion for Summary Judgment, with Affidavit of Kenneth Froberg.
June 19, 1973	Separate Answer of Defendant, Emhart Corp., in the <u>State of California</u> action.
June 21, 1973	Separate Answers of Defendant, Sargent & Co., in the <u>State of New Jersey</u> and the <u>State of California</u> actions.
June 26, 1973	Hearing on Defendants' Motion for Summary Judgment.
July 9, 1973	Separate Answer of Defendant, Eaton Corp., in the <u>State of California</u> action.

<u>DATE</u>	
July 16, 1973	Separate Answer of Defendant, Ilco Corp., in the <u>State of California</u> action.
August 23, 1973	Ruling on Motion for Summary Judgment.
August 29, 1973	Motion to Amend Order to Include Certificate Pursuant to 28 U.S.C. §1292 (b).
September 11, 1973	Defendants' Memorandum in Support of Joint Motion to Amend Order to Include Certificate Pursuant to 28 U.S.C. §1292 (b).
September 13, 1973	Opposition to Defendants' Request for Certification under §1292 (b).
September 20, 1973	Ruling on Motion to Amend Order.
February 11, 1974	Motion of the <u>State of Wisconsin</u> to Intervene as Plaintiff.
April 25, 1974	Plaintiffs' Suggestions Regarding Procedures for Trial.
April 25, 1974	Summary of Evidence with Respect to Defendants' Conspiracy to Eliminate Competition and Raise Prices for Contract Hardware on Masterkey Jobs.
September 3, 1974	Motion of the <u>State of Minnesota</u> to Intervene as Plaintiff.
September 9, 1974	Order Granting Motion to Intervene of State of Wisconsin; Order Granting Motion to Intervene of State of Minnesota; Complaints filed in <u>State of Wisconsin</u> and <u>State of Minnesota</u> actions.
September 18, 1974	Motion for Separation of Liability and Damage Issues for Trial.
September 30, 1974	Separate Answers of Defendant, Emhart Corp., in <u>State of Wisconsin</u> and <u>State of Minnesota</u> actions.

DATE

October 8, 1974	Separate Answers of Defendant, Ilco Corp., in the <u>State of Wisconsin and State of Minnesota</u> actions.
November 21, 1974	Memorandum in Support of Motion to Separate Liability and Damage Issues.
December 2, 1974	Plaintiffs' Memorandum of Law with Respect to Nature and Proof of Anti-trust Violations Committed by Defendants.
December 9, 1974	Plaintiffs' Designation of Evidence with Respect to Trial of Liability Issues.
December 11, 1974	Motion of the <u>State of Michigan</u> to Intervene as Plaintiff; Complaint in <u>State of Michigan</u> action filed.
January 3, 1975	Defendants' Motion for Denial of Class Certification and Memorandum in Support Thereof.
January 3, 1975	Defendants' Memorandum in Opposition to Plaintiffs' Rule 42 Motion.
January 3, 1975	Memorandum of Defendants, Sargent & Co., and Emhart Corp., Concerning Procedures for Trial.
January 10, 1975	Separate Class Action and Trial Proposal of Defendants, Eaton Corp., and Ilco Corp.
January 17, 1975	Judgment entered in <u>Bermar Construction Corp.</u> action dismissing it without prejudice.
January 22, 1975	Reply Memorandum in Support of Motion to Separate Liability and Damage Issues.
January 22, 1975	Motion for Consolidation of Pending Cases and Separation of Liability and Damage Issues for Trial.
January 22, 1975	Plaintiffs' Memorandum in Support of the State-Wide Class Actions.

DATE

January 27, 1975	Plaintiffs' Memorandum in Support of the Nationwide Class Actions.
January 27, 1975	Hearing on Defendants' Motion for Denial of Class Certification, and Plaintiffs' Motions for Consolidation of Pending Cases, Separation of Issues, and Certification of State-Wide Classes.
February 3, 1975	Defendants' Memorandum on Impact and Trial Issues.
February 19, 1975	Separate Answer of Defendant, Emhart Corp. in the <u>State of Michigan</u> action.
May 2, 1975	Separate Answers of Defendant, Eaton Corp., in the <u>State of Wisconsin, State of Minnesota, and State of Michigan</u> actions.
May 23, 1975	Separate Answer of Defendant, Ilco Corp., in the <u>State of Michigan</u> action.
May 28, 1975	Ruling on Pending Motions, certifying classes in the <u>City of Philadelphia</u> and <u>Amherst Leasing Corp.</u> actions, certifying 14 state-wide class actions, transferring all but two pending actions to the District of Connecticut, consolidating those cases pursuant to Rule 42 (a), separating issues pursuant to Rule 42 (b), and postponing discovery as to damage issues.
June 25, 1975	Motion to Amend Order to Include Certificate Pursuant to 28 U.S.C. § 1292 (b), and Memorandum in Support Thereof.
June 25, 1975	Notice of Appeal filed by all Defendants.
June 30, 1975	Withdrawal of Request for Certification by Defendant Emhart Corp. only; Withdrawal of Appeal by Defendant Emhart Corp. only.

DAT :

July 3, 1975	Plaintiffs' Motion to Dismiss Appeal and Memorandum in Support Thereof.
July 7, 1975	Plaintiffs' Reply Opposing §1292 (b) Certification.
July 7, 1975	Opposition to the Non-Settling Defendants' Request for Certification Under §1292 (b).
July 10, 1975	Defendants' Reply Memorandum in Support of Joint Motion to Amend to Include Certificate Pursuant to 28 U.S.C. §1292 (b).
July 25, 1975	Defendants' Motion for Summary Judgment in the <u>State of California</u> action.
August 11, 1975	Ruling on Motion for Certification of Interlocutory Appeal.
August 20, 1975	Defendants' Motion to Dismiss <u>Sturdy Homes Company</u> action.
August 25, 1975	Plaintiffs' Supplemental Memorandum in Support of Motion to Dismiss Appeal.
August 26, 1975	Motion for Reconsideration of Defendants' Motion for Certification of Interlocutory Appeal.
August 28, 1975	Brief of Defendants-Appellants in Opposition to Motion to Dismiss Appeal.
September 2, 1975	Motion of State of Colorado to Intervene as Plaintiff and Complaint in <u>State of Colorado</u> action filed in the District of Connecticut.
September 2, 1975	Hearing on Plaintiffs' Motion to Dismiss Appeal; Motion denied without prejudice.
September 4, 1975	Defendants' Motion for Reconsideration of Motion for Certification of Interlocutory Appeal denied.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

CITY OF PHILADELPHIA, on behalf
of itself and on behalf of all
state, county and local govern-
ments and governmental agencies
throughout the United States,

Plaintiff

vs.

EMHART CORPORATION;
SARGENT AND COMPANY;
EATON YALE AND TOWNE, INC.;
and ILCO CORPORATION;

Defendants

: CIVIL ACTION NO. 70-352

:

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: COMPLAINT - CLASS ACTION

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: JURY TRIAL DEMANDED

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C O M P L A I N T

1. This complaint is filed and these proceedings are instituted under Section 4 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 731 (15 U.S.C. §1), to recover treble damages and the costs of suit, including a reasonable attorney's fee, against the defendants for the injuries sustained by plaintiff and other members of the class represented by it by reason of defendants' violations, as hereinafter alleged, of Section 1 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209 (15 U.S.C. §1), commonly known as the Sherman Act.

2. Plaintiff, City of Philadelphia, is a municipal corporation of the Commonwealth of Pennsylvania.

CLASS ACTION ALLEGATIONS

3. Plaintiff is representative of a class as defined by Rule 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure and brings this action on behalf of the entire class. The class consists of all state, county and local governments and governmental authorities and agencies in the United States who have purchased locks with master key systems from one or more of the defendants and/or their co-conspirators during the period of the combinations and conspiracies alleged herein. The size of the class is in excess of 21,000, consisting of 50 states, the District of Columbia, 3,049 counties, 18,048 municipalities (683 of which have a population in excess of 25,000) and governmental agencies, thereof, the exact number of which is presently unknown to plaintiff.

4. Plaintiff will adequately protect the interests of the absent members of the class. Plaintiff's interests are coincident with, not adverse to, the interests of the members of the class.

5. There are questions of law and fact common to the class, which questions relate both to the illegal combinations and conspiracies alleged among each defendant and its distributors and among all the defendants. These common questions of law and fact predominate over any questions which may affect only individual class members.

6. The class action is superior to other available methods for the fair and efficient adjudication of this controversy. The class is readily definable and whatever difficulties may exist, if any, in its management will be greatly outweighed by the benefits of the class action device, including but not limited to the elimination of the possibility of repetitious litigation and providing a method of redress for small claims which may otherwise not warrant individual litigation.

7. The prosecution of separate actions by individual members of the class will create the risk of inconsistent or varying adjudications in different jurisdictions with respect to various members of the class.

8. Defendant Emhart Corporation, also referred to herein as "Emhart", is a corporation organized and existing under the laws of the State of Connecticut, having its principle place of business and offices in Hartford, Connecticut. Russell and Erwin and P. & F. Corbin (hereinafter referred to as "Russwin" and "Corbin", respectively) are sales divisions of the New Britain Division of Emhart. Emhart is one of the major manufacturers of master key systems in the United States.

9. Defendant Sargent and Company, also referred to herein as "Sargent", is a corporation organized and existing under the laws of the State of Delaware, having its principle place of business and offices in New Haven, Connecticut. Sargent is a

subsidiary of Walter Kidde and Company, Inc.

10. Defendant Eaton Yale and Towne, Inc., also referred to herein as "Yale", is a corporation organized and existing under the laws of the State of Ohio, having its principal place of business and offices in Cleveland, Ohio and is engaged in the manufacture of master key systems at its Yale lock and hardware division, which is located in Rye, New York.

11. Defendant Ilco Corporation formally doing business and known as Independent Lock Company, and referred to herein as "Ilco", is a corporation organized and existing under the laws of the Commonwealth of Massachusetts having its principal place of business and offices in Fitchburg, Massachusetts.

12. Each of the afore-named defendants is a major manufacturer of master key systems in the United States and each transacts business and is found in the Eastern District of Pennsylvania. During the time of the conspiracy alleged herein, each of said corporations engaged in the business of manufacturing, selling and distributing master key systems in the Eastern District of Pennsylvania and in the various states of the United States.

13. (a) Emhart has approximately nine hundred distributors located throughout the United States. Master key systems manufactured by Emhart are sold by its Russwin and Corbin sales divisions, under the brand names of "Russwin" and "Corbin", to distributors who represent either, but not both, of said sales divisions.

(b) Sargent has approximately one hundred seventy five distributors located throughout the United States.

(c) Yale has approximately two hundred distributors located throughout the United States.

(d) Ilco has approximately one hundred fifty distributors located throughout the United States.

(e) Each of the foregoing distributors of each of the defendants purchases master key systems from each defendant for which it acts as a distributor and resells them for use in hospitals, colleges, schools, hotels, apartments, office buildings and similar buildings. Frequently, the owner or architect for a new building will request that a distributor from one of the defendants prepare specifications for a master key system to be installed in the new building. These specifications are usually prepared without specific charge and generally specify the installation of the master key system manufactured by the defendant for whom the distributor acts.

14. Master key systems are lock and key systems designed specifically for a particular building or complex of buildings in accordance with the plan for limiting access to specified areas within such buildings. Normally such a system provides a key for each door, each of which is keyed differently; one or a series of master keys which will lock and

unlock a certain group of doors; one or a series of grand master keys which will lock or unlock two or more groups of doors; and a great grand master key which will lock and unlock all the doors in the system. Frequently, the owner of the building which has a master key system installs an extension to the existing system when expanding existing facilities.

15. Various persons, firms, and organizations, not made defendants herein have participated as co-conspirators with the defendants in the violations alleged herein and have performed acts and made statements in furtherance thereof. Such co-conspirators include, but are not limited to, each defendant's distributors of master key systems.

16. There is a continuous flow in interstate of commerce of the hardware used in master key systems from the plant of each of the defendant manufacturers to their distributors located in other states. In 1966, Emhart's sales of hardware used in master key systems exceeded ten million dollars. In 1966, Sargent's sales of hardware used in master key systems exceeded six million dollars. In 1966, Yale's sales of hardware used in master key systems exceeded five million dollars. In 1966, Ilco's sales of hardware used in master key systems exceeded four million dollars.

17. Beginning at least as early as 1960 and continuing thereafter until at least July of 1969, the exact dates being to the

plaintiff unknown, because of defendants' fraudulent concealment referred to in paragraph 21 hereof, the defendants and co-conspirators have, throughout the United States, engaged in a combination and conspiracy in restraint of the foregoing interstate trade and commerce in violation of Section 1 of the Sherman Act, Section 1 of the Act of Congress of July 2, 1890, amended (15 U.S.C. §1).

18. The unlawful combination and conspiracy consisted of a continuing agreement and a concert of action among the defendants and certain co-conspirators, and as a result, among each defendant and its co-conspirator-distributors, the substantial terms of which have been:

(a) Co-conspirator distributors of each defendant will not sell master key systems and extensions to such master key systems outside the territories allocated to them by that defendant for which the distributor acts.

(b) Co-conspirator distributors of each defendant will not compete against any other distributor of that defendant for which he acts, who has written the specifications for the master key system.

(c) Co-conspirator distributors of each defendant will not bid on or sell extensions to master key systems when the original master key system was sold by another distributor of that defendant for which he acts as a distributor.

19. For the purpose of effectuating and carrying out the aforesaid unlawful combination and conspiracy, the defendant and co-conspirators have done the things which as hereinbefore alleged they conspired and agreed to do and more particularly, have cooperated in the policing and enforcing of the said conspiracy.

20. The aforesaid combination and conspiracy has had the following effects among others:

(a) Competition between and among the defendants and co-conspirators was restricted and suppressed, and purchasers of master key systems, including the plaintiff and members of the class it represents, have been deprived of benefits of free and open competition.

(b) Competition between the distributors of a particular defendant in the sale of that defendant's master key systems and extensions to such master key systems has been eliminated, and the plaintiff and members of the class it represents have been deprived of the opportunity of obtaining such products in an unrestricted market.

(c) Prices of master key systems sold by defendant corporations and their distributors to plaintiff and the members of the class it represents were raised, fixed, stabilized and maintained at non-competitive levels.

21. Plaintiff had no knowledge of the combination and conspiracy alleged herein, or of any facts which might have led to the discovery thereof until approximately July 11, 1969. Plaintiff could not have discovered the conspiracy at an earlier date by the exercise of due diligence because of deceptive practices and techniques of secrecy employed by defendants to avoid detection and to fraudulently conceal such combination and conspiracy.

22. During the period from at least 1960 to July 1969, plaintiff and members of the class it represents have purchased locks with master key systems sold by one or more of the defendants and co-conspirators.

23. By reason of the defendants' conspiracy hereinabove alleged and because of each defendant's conspiracy hereinabove alleged with its respective distributors, plaintiff's aforesaid purchases were made at prices higher than the prices which plaintiff would have had to pay under natural conditions of competition in the absence of any such conspiracies and plaintiff has been thereby injured and damaged. The other members of the class represented by plaintiff have purchased the products described herein at prices illegally enhanced by the defendants' conspiracy as herein alleged and by each defendant's conspiracy as herein

alleged with its respective distributors and the other members of the class represented by plaintiff have been injured and damaged thereby. Plaintiff is unable to state its damages with precision at the present time, since its determination will require discovery of and an analysis and accounting from defendants' books and records.

WHEREFORE, plaintiff demands:

(a) That the alleged combination and conspiracy among the defendants be adjudged and decreed to be in unreasonable restraint of trade in violation of Section 1 of the Sherman Act;

(b) That the alleged combination and conspiracy among each of the defendants and its distributors respectively be adjudged and decreed to be in unreasonable restraint of trade in violation of Section 1 of the Sherman Act;

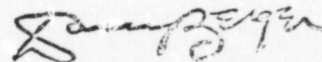
(c) Judgment be entered against the defendants and in favor of plaintiff and each member of the class it represents for threefold the damages determined to have sustained by plaintiff together with the costs of suit, including reasonable attorney's fees;

(d) That defendant be enjoined from

continuing the acts, conduct and conspiracy herein-
before alleged;

(a) Such other and further relief as may
appear necessary and appropriate.

Edward G. Bauer
City Solicitor of
City of Philadelphia



David Berger
Herbert B. Newberg
H. Laddie Montague, Jr.
Howard L. Schambelan
Alan M. Lerner
Special Counsel for
Plaintiff City of Philadelphia

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Philadelphia, Pennsylvania 19107

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

AMHERST LEASING CORPORATION and	:	CIVIL ACTION NO. 70-494
those plaintiffs listed on Exhibit	:	
"A" attached hereto, on their own	:	
behalf and on behalf of owners and	:	
builder-owners of apartment houses,	:	
office buildings, hotels and motels	:	
throughout the United States	:	
Plaintiffs	:	
	:	
v.	:	COMPLAINT - CLASS ACTION
	:	
EMHART CORPORATION;	:	
SARGENT AND COMPANY;	:	
EATON YALE AND TOWNE, INC.;	:	
and ILCO CORPORATION;	:	
Defendants	:	JURY TRIAL DEMANDED

C O M P L A I N T

1. This complaint is filed and these proceedings are instituted under Section 4 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 731 (15 U.S.C. §1), to recover treble damages and the costs of suit, including a reasonable attorney's fee, against the defendants for the injuries sustained by plaintiffs and other members of the class represented by them by reason of defendants' violation, as hereinafter alleged, of Section 1 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209 (15 U.S.C. §1), commonly known as the Sherman Act.

2. Plaintiff Amherst Leasing Corporation and those plaintiffs listed on Exhibit "A" attached hereto have their principle place of business at 97-77 Queens Boulevard, Forest Hills, New York. Those plaintiffs with the word "Corporation" in their title are corporations duly organized and existing under the laws of the State of New York. All other plaintiffs are either partnerships or trusts. All plaintiffs are builders-owners of apartment houses and/or office buildings.

CLASS ACTION ALLEGATIONS

(paragraphs 3 through 7)

3. Plaintiffs are representatives of a class as defined by Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure and bring this action on behalf of the entire class. The class consists of owners and builder-owners of apartments, hotels, motels and office buildings throughout the United States who have purchased locks with master key systems manufactured by one or more of the defendants and/or their co-conspirators during the period of the combinations and conspiracies alleged herein. During the years 1960 through 1969, there were approximately 184,818 residential units for five or more families constructed throughout the United States and approximately 87,499 office buildings. It is estimated that in 1968, there were approximately 21,400 hotels and 44,000 motels throughout the United States. The class is so numerous that joinder of all members is impracticable.

4. Plaintiffs are builders of apartment houses and office buildings and will adequately represent the interests of the absent members of the class. Plaintiffs' interests are coincident with, and not adverse to the interests of the members of the class.

5. There are questions of law and fact common to the class, which questions relate, inter alia, both to the illegal combinations and conspiracies hereinafter alleged among each defendant and its distributors and among all the defendants. The common questions of law and fact involved herein predominate over any questions which may affect only individual class members.

6. The class action is superior to other available methods for the fair and efficient adjudication of this controversy. Whatever difficulties may exist, if any, with the management of the class will be greatly outweighed by the benefits of the class action device, including but not limited to the elimination of the possibility of repetitious litigation and providing a method of redress for small claims which may otherwise not warrant individual litigation.

7. The prosecution of separate actions by individual members of the class will create the risk of inconsistent or varying adjudications in different jurisdictions with respect to various members of the class.

8. Defendant Emhart Corporation, also referred to herein as "Emhart", is a corporation organized and existing under the laws of the State of Connecticut, having its principle place of business and offices in Hartford, Connecticut. Russell and Erwin and P. & F. Corbin (hereinafter referred to as "Russwin" and "Corbin", respectively) are sales divisions of the New Britain Division of Emhart. Emhart is one of the major manufacturers of master key systems in the United States.

9. Defendant Sargent and Company, also referred to herein as "Sargent", is a corporation organized and existing under the laws of the State of Delaware, having its principle place of business and offices in New Haven, Connecticut. Sargent is a subsidiary of Walter Kidde and Company, Inc.

10. Defendant Eaton Yale and Towne, Inc., also referred to herein as "Yale", is a corporation organized and existing under the laws of the State of Ohio, having its principle place of business and offices in Cleveland, Ohio and is engaged in the manufacture of master key systems at its Yale lock and hardware division, which is located in Rye, New York.

11. Defendant Ilco Corporation formally doing business and known as Independent Lock Company, and referred to herein as "Ilco", is a corporation organized and existing under the laws of the Commonwealth of Massachusetts having its principal place of business and offices in Fitchburg, Massachusetts.

12. Each of the afore-named defendants is a major manufacturer of master key systems in the United States and each transacts business and is found in the Eastern District of Pennsylvania. During the time of the conspiracy alleged herein, each of said corporations engaged in the business of manufacturing, selling and distributing master key systems in the Eastern District of Pennsylvania and in the various states of the United States.

13. (a) Emhart has approximately nine hundred distributors located throughout the United States. Master key systems manufactured by Emhart are sold by its Russwin and Corbin sales divisions, under the brand names of "Russwin" and "Corbin", to distributors who represent either, but not both, of said sales divisions.

(b) Sargent has approximately one hundred seventy five distributors located throughout the United States.

(c) Yale has approximately two hundred distributors located throughout the United States.

(d) Ilco has approximately one hundred fifty distributors located throughout the United States.

(e) Each of the foregoing distributors of each of the defendants purchases master key systems from each defendant for which it acts as a distributor and resells them for use in hospitals, colleges, schools, hotels, apartments, office buildings and similar buildings. Frequently, the owner or architect for a new building will request that a distributor from one of the defendants prepare specifications for a master key

system to be installed in the new building. These specifications are usually prepared without specific charge and generally specify the installation of the master key system manufactured by the defendant for whom the distributor acts.

14. Master key systems are lock and key systems designed specifically for a particular building or complex of buildings in accordance with the plan for limiting access to specified areas within such buildings. Normally such a system provides a key for each door, each of which is keyed differently; one or a series of master keys which will lock and unlock a certain group of doors; one or a series of grand master keys which will lock or unlock two or more groups of doors; and a great grand master key which will lock and unlock all the doors in the system. Frequently, the owner of the building which has a master key system installs an extension to the existing system when expanding existing facilities.

15. Various persons, firms, and organizations, not made defendants herein have participated as co-conspirators with the defendants in the violations alleged herein and have performed acts and made statements in furtherance thereof. Such co-conspirators include, but are not limited to, each defendant's distributors of master key systems.

16. There is a continuous flow in interstate of commerce of the hardware used in master key systems from the plant of each of the defendant manufacturers to their distributors located in other states. In 1966, Emhart's sales of hardware used in master key systems exceeded ten million dollars. In 1966, Sargent's sales of hardware used in master key systems exceeded six million dollars. In 1966, Yale's sales of hardware used in master key systems exceeded five million dollars. In 1966, Ilco's sales of hardware used in master key systems exceeded four million dollars.

17. Beginning at least as early as 1960 and continuing thereafter until at least July of 1969, the exact dates being to the plaintiffs unknown because of defendants' fraudulent concealment referred to in paragraph 21 hereof, the defendants and co-conspirators have, throughout the United States, engaged in a combination and conspiracy in restraint of the foregoing interstate trade and commerce in violation of Section 1 of the Sherman Act, Section 1 of the Act of Congress of July 2, 1890, amended (15 U.S.C. §1).

18. The unlawful combination and conspiracy consisted of a continuing agreement and a concert of action among the defendants and certain co-conspirators, and as a result, among each defendant and its co-conspirator-distributors, the substantial terms of which have been:

(a) Co-conspirator distributors of each defendant will not sell master key systems and extensions to such master key systems outside the territories allocated to them by that defendant for which the distributor acts.

(b) Co-conspirator distributors of each defendant will not compete against any other distributor of that defendant for which he acts, who has written the specifications for the master key system.

(c) Co-conspirator distributors of each defendant will not bid on or sell extensions to master key systems when the original master key system was sold by another distributor of that defendant for which he acts as a distributor.

19. For the purpose of effectuating and carrying out the aforesaid unlawful combination and conspiracy, the defendant and co-conspirators have done the things which as hereinbefore alleged they conspired and agreed to do and more particularly, have cooperated in the policing and enforcing of the said conspiracy.

20. The aforesaid combination and conspiracy has had the following effects among others:

(a) Competition between and among the defendants and co-conspirators was restricted and suppressed, and purchasers of master key systems, including the plaintiffs and members of the class they represent, have been deprived of benefits of free and open competition.

(b) Competition between the distributors of a particular defendant in the sale of that defendant's master key systems and extensions to such master key systems has been eliminated, and the plaintiffs and members of the class they represent have been deprived of the opportunity of obtaining such products in an unrestricted market.

(c) Prices of master key systems sold by defendant corporations and their distributors to plaintiffs and other members of the class they represent were raised, fixed, stabilized and maintained at non-competitive levels.

21. Plaintiffs had no knowledge of the combination and conspiracy alleged herein, or of any facts which might have led to the discovery thereof until approximately July 11, 1969. Plaintiffs could not have discovered the conspiracy at an earlier date by the exercise of due diligence because of deceptive practices and techniques of secrecy employed by defendants to avoid detection and to fraudulently conceal such combination and conspiracy.

22. During the period from at least 1960 to July 1969, plaintiffs and members of the class they represent have purchased locks with master key systems sold by one or more of the defendants and co-conspirators.

23. By reason of the defendants' conspiracy hereinabove alleged and because of each defendant's conspiracy hereinabove alleged with its respective distributors, plaintiffs' aforesaid purchases were made at prices higher than the prices which plaintiffs would have had to pay under natural conditions of competition in the absence of any such conspiracies and plaintiffs have been thereby injured and damaged. The other members of the class represented by plaintiffs have purchased the products described herein at prices illegally enhanced by the defendants' conspiracy as herein alleged and by each defendant's conspiracy as herein alleged with its respective distributors and the other members of the class represented by plaintiffs have been injured and damaged thereby. Plaintiffs are unable to state their damages with precision at the present time, since their determination will require discovery of and an analysis and accounting from defendants' books and records.

WHEREFORE, plaintiffs demand:

- (a) That the alleged combination and conspiracy among the defendants be adjudged and decreed to be unreasonable restraint of trade in violation of Section 1 of the Sherman Act;
- (b) That the alleged combination and conspiracy among each of the defendants and its distributors respectively be adjudged and decreed to be in unreasonable restraint of trade in violation of Section 1 of the Sherman Act;
- (c) Judgment be entered against the defendants and in favor of each plaintiff and each member of the class they represent for threefold the damages determined to have been sustained by each plaintiff together with the costs of suit, including reasonable attorney's fees;
- (d) that defendant be enjoined from continuing the acts, conduct and conspiracy hereinbefore alleged;

(e) Such other and further relief as may appear necessary and appropriate.

David Berger

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Herbert B. Newberg
H. Laddie Montague, Jr.
Howard L. Schambelan
Alan M. Lerner
Counsel for Plaintiffs

Of Counsel:
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Name of Corporation

Amherst Leasing Corp.
Annapolis Leasing Corp.
Argentine Leasing Co.
Atlantis Leasing Corp.
Auburn Leasing Corp.
Brazilia Leasing Co.
Brisbane Leasing Co.
Bucknell Leasing Corp.
Cambridge Leasing Corp.
Canada Leasing Corp.
Ceylon Leasing Co.
Citadel Leasing Corp.
Colombia Leasing Co.
Copenhagen Leasing Corp.
Georgetown Leasing Corp.
Greenwich Leasing Corp.
Hampton Leasing Corp.
Harvard Leasing Corp.
Imperial Leasing Corp.
LaFrance Leasing Corp.
London Leasing Corp.
Mandalay Leasing Co.
Martinique Leasing Corp.
Melbourne Leasing Co.
Mexico Leasing Corp.
Montauk Leasing Co.
Montclair Leasing Co.
Nautilus Leasing Corp.
Northwestern Leasing Corp.
Notre Dame Leasing Corp.
Oxford Leasing Corp.
Panama Leasing Co.
Pennsylvania Leasing Corp.
Peru Leasing Company
Purdue Leasing Corp.
Rome Leasing Corp.
Shalimar Leasing Co.
Singapore Leasing Co.
Sydney Leasing Co.
Syracuse Leasing Corp.
Tulane Leasing Corp.
Uess Leasing Corp.
Wellington Leasing
West Point Leasing Corp.
Westport Leasing Corp.
Yaille Leasing Corp.

governed primarily by 28 U.S.C.A. § 1920:

"A judge or clerk of any court of the United States may tax as costs the following:

"(1) Fees of the clerk and marshal;

"(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

"(3) Fees and disbursements for printing and witnesses;

"(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

"(5) Docket fees under section 1923 of this title.

"A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree. June 25, 1948, c. 646, 62 Stat. 955."

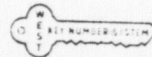
Taxation of costs is a matter within the discretion of the court. *United States v. So. Ry.*, W.D.N.C.1967, 278 F.Supp. 60.

[2-4] Generally, costs are allowed only to a prevailing party. Rule 54(d), Fed.R.Civ.P.; *Lichter Foundation, Inc. v. Welch*, 6 Cir. 1959, 269 F.2d 142. Where neither party prevails, it is appropriate to deny costs to both parties. *Srybnik v. Epstein*, 2 Cir. 1956, 230 F.2d 683. In any case, non-statutory costs should be taxed sparingly. *Farmer v. Arabian American Oil Co.*, 1964, 379 U.S. 227, 85 S.Ct. 411, 13 L.Ed.2d 248.

[5-8] The clerk's filing fee may be taxed as costs. 28 U.S.C.A. § 1920; *Gotz v. Universal Prod. Co., Inc.*, D.Del. 1943, 3 F.R.D. 153. Attorneys' fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 1967, 386 U.S. 714, 717, 87 S.Ct. 1404, 18 L.Ed.2d 475. Counsel fees should be awarded only in rare and unusual instances. *Cohen v. Lovitz*, D.D.C.1966, 255 F.Supp. 302, *aff'd sub nom. Wolf v. Cohen*, 1967, 126 U.S.App.D.C. 423, 379 F.2d 477.

Travel and subsistence expenses, particularly for counsel, need not be taxed as costs. Cf. *Gerber v. Stoltenberg*, 5 Cir. 1968, 394 F.2d 179.

An order dismissing the action and denying Hohensee's other requests for relief will issue.



CITY OF PHILADELPHIA

v.

EMHART CORPORATION et al.
AMHERST LEASING CORPORATION et al.

v.

EMHART CORPORATION et al.
Civ. A. Nos. 70-352, 70-191.

United States District Court,
E. D. Pennsylvania.
June 23, 1970.

Action by city and class action by builder-owners of apartment houses and/or office buildings for alleged unlawful agreements between defendant manufacturers and distributors of lock and key systems and for horizontal conspiracy between manufacturers. On defendants' motion for order that case could not be maintained as class action, the District Court, Wood, J., held that plaintiffs' showing in advance of discovery was sufficient to permit tentative class action treatment.

Motion denied.

See also D.C., 317 F.Supp. 1320.

1. Federal Civil Procedure ¶161

In order to have action qualified for class action treatment, plaintiff has bur-

CITY OF PHILADELPHIA v. EMHART CORPORATION

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Cite as 50 F.R.D. 232 (1970)

den of showing that the four prerequisites of class action rule are satisfied and, in addition, that the proposed class action comes within one of the three categories enumerated in the rule. Fed. Rules Civ.Proc. rules 23, 23(a,b), 28 U.S.C.A.

2. Federal Civil Procedure §181

City bringing class action against manufacturers of lock and key systems for alleged vertical and horizontal conspiracy and builder-owners of apartment houses and/or office buildings seeking to represent class consisting of purchasers of key systems manufactured by one or more of the defendants made sufficient showing, in advance of discovery, to tentatively grant class action treatment. Fed.Rules Civ.Proc. rule 23. 28 U.S.C.A.

David Berger, H. Laddie Montague, Jr., Philadelphia, Pa., for plaintiff.

Henry T. Reath, Duane, Morris & Heckscher, Philadelphia, Pa., for Emhart Corporation.

Edwin P. Rome, Blank, Rome, Klaus & Comisky, Philadelphia, Pa., for defendant Sargent & Co.

Miles W. Kirkpatrick, Morgan, Lewis & Bockius, Philadelphia, Pa., for defendant Eaton, Yale & Towne, Inc.

Richard G. Schneider, Dechert, Price & Rhodas, Philadelphia, for ILCO Corporation.

OPINION AND ORDER

WOOD, District Judge.

This is a motion by the defendants seeking an order that the above-captioned case may not be maintained as a class action pursuant to Rule 23. The defendants are manufacturers of so-called Master Key Systems, which are lock and key systems designed specifically for a particular complex of buildings,

and include keys which open only a single lock in the system, and master keys, which will open all or a group of locks within the system. On July 11, 1969, the Justice Department brought separate but identical civil actions against each of the four defendants in this case, which charged them with violating Section 1 of the Sherman Act by entering into unlawful vertical agreements with their distributors providing that such distributors would not sell outside of their allocated territories, would not compete against other distributors of the same manufacturer who had already written specifications for a Master Key System, and would not bid on extensions to Master Key Systems installed by another distributor. To date three of the defendants, Ileo, Emhart, and Sargent, have elected to terminate their litigation with the Government by entering into consent decrees.

Meanwhile, two suits have been commenced in this Court against all four defendants alleging the same vertical conspiracies alleged by the Government and, in addition, alleging a horizontal conspiracy between all defendants by which they agreed among themselves to carry out the terms of their vertical conspiracy. It is also alleged that the defendants fraudulently concealed their conspiracies, and that, as a result of such conspiracies, prices of Master Key Systems were artificially raised, fixed, and stabilized at non-competitive levels.

In its complaint, the City of Philadelphia seeks to maintain a class action on behalf of itself and "all state, county, and local governmental authorities and agencies in the United States who have purchased locks with Master Key Systems from one or more of the defendants. Plaintiff estimates that this class numbers in excess of 21,000, consisting of fifty states and the District of Columbia, 3,049 counties, 18,048 municipalities, and governmental agencies, of which the precise number is not known to the plaintiff. In the other

action, the plaintiffs are Amherst Leasing Corporation and 45 other builder-owners of apartment houses and/or office buildings, and they seek to represent a class consisting of "owners and builder-owners of apartments, hotels, motels and office buildings throughout the United States who have purchased locks " Master Key Systems manufactured by one or more of the defendants." It is alleged that during 1960-69 there were approximately 184,818 residential units for five or more families constructed throughout the United States and approximately 87,499 office buildings and that in 1968, there were approximately 21,400 hotels and 44,000 motels throughout the United States.

[1] In order to have his action qualify for class action treatment, the plaintiff has the burden of showing that the four prerequisites of Rule 23(a) are satisfied and, in addition, the proposed class action comes within one of the three categories enumerated in Rule 23(b). *Philadelphia Electric Company v. Anaconda American Brass Co.*, 43 F.R.D. 452 (E.D.Pa.1968). Since the plaintiff's qualifications with respect to the relevant criteria under Rule 23 are well covered in his brief, we will confine our consideration here to the points raised by the defendant. The defendant first contends, citing Judge Fullam's opinion in *Philadelphia Electric Company v. Anaconda American Brass Co.*, *supra*, that in order to be declared a class action, the plaintiffs must present a "genuine issue", that is, some indication that his claim may have merit beyond mere pleadings. 43 F.R.D. at 458. In that case Judge Fullam concluded that:

* * * "It is enough for present purposes to state that the indictments, the sentences imposed thereunder, and some of the results of the discovery to date, together warrant a finding that plaintiffs' claim of conspiracy may have merit and is a genuine issue in this litigation."

It is then argued that as to the alleged horizontal conspiracy, there is no indication of merit other than the plaintiff's pleadings and that these pleadings have been effectively nullified by affidavits filed by officers of the defendant corporations denying any conspiracy with each other. As to the alleged vertical conspiracies, the defendants contend that since the Master Key System is a highly individualized unit which is tailor-made to suit each customer's particular needs, and since distribution arrangements differ greatly from region to region, questions of law and fact common to the members of plaintiffs' class do not predominate over questions affecting only individual members, as required by Rule 23(b) (3).

It is not clear from the relevant cases whether, and if so what, preliminary showing of merit to the plaintiffs' claim is a prerequisite to the maintenance of a class action. Rule 23 itself, which is detailed in some aspects, does not provide for any such preliminary determination. However, in view of the obvious burden on the Court and on the defendant of maintaining a class action, some courts have required a preliminary showing of substantiality before declaring a class action or before sending out notice to the proposed class. In *Delgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y.1968) after a full opportunity for discovery, Judge Weinstein ordered a hearing at which he required the plaintiffs to show a "substantial possibility that they will prevail on the merits" before allowing the class action to proceed and notice to be sent out. On the other hand, Judge Metzner in similar circumstances in *Mersay v. First Republic Corporation of America*, 43 F.R.D. 465 (S.D.N.Y.1968) reached a nearly opposite conclusion:

* * * "In this case such a hearing would be a fact-finding procedure that would deprive the plaintiff and the class of the right to a jury trial. It would turn rule 23 into a cumbersome procedure. I cannot conceive

CITY OF PHILADELPHIA v. EMHART CORPORATION

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that the drafters of the rule intended necessarily extensive hearings to determine facts which may be ultimate to the litigation." 45 F.R.D. at 469.

Although the Second Circuit has not yet resolved the disparity between these two cases, see *Green v. Wolf Corporation*, 406 F.2d 291, 301, fn. 15 (2nd Cir. 1968), language in the recent decision of our Circuit in *Kahan v. Rosenstiel*, 424 F.2d 161 (1970), albeit on a somewhat different point, suggests that it inclines toward the less onerous rule from the plaintiff's point of view at least at the outset of the case.

* * * "The determination whether there is a proper class does not depend on the existence of a cause of action. A suit may be a proper class action, conforming to Rule 23, and still be dismissed for failure to state a cause of action." (p. 169)

This would seem to be in accord with the suggestion of Professor Moore that the requisite preliminary showing be a "minimal demonstration that the complaint is sincere and the aggregate group claim is substantial" or a "demonstration that the claim put forth on behalf of the class is more than frivolous or speculative." 3B Moore's Federal Practice, ¶ 23.45[3]. *cf. Philadelphia Electric Company v. Anaconda American Brass Co.*, *supra*.

[2] At this juncture of the case, the plaintiff has satisfied the minimal burden suggested by the latter cases. While we do not decide now what burden we may place on the plaintiffs before sending out notice or allowing the action to proceed at some later point, to impose any further burden on the plaintiff at this time would be premature and unfair to the plaintiff. The defendants here have made a motion to deny a class action and a motion to stay discovery, so that the plaintiff has not had the opportunity to develop his case far beyond the pleadings. However, if at some later time after discovery has proceeded and

other preliminary motions are disposed of, we will again entertain a motion on this ground if the defendants at that time desire to press it.

With regard to the defendant's contention that if the allegations of a horizontal conspiracy fall, a class action on the basis of a separate vertical conspiracy could not be maintained, we must disagree, at least from the vantage point of the threshold of the case. Pursuant to Rule 23(c) (3) we could at the proper time divide the plaintiffs' class into four separate subclasses, one for each manufacturer's chain of distribution. For each class, there would then be one predominant question common to the class, namely, whether that manufacturer's distributorship agreements providing for the allocation of market territories violated Section 1 of the Sherman Act and, if so whether such violation damaged the members of plaintiffs' class. "Here as in the normal antitrust case, proof of the conspiracy will present predominant questions of both law and fact." *State of Minnesota v. United States Steel Corporation*, 44 F.R.D. 559, 572 (D.C.Minn.1968). See also *State of Illinois v. Harper and Row Publishers, Inc.*, 391 F.Supp. 484 (N.D.Ill.1969); *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2nd Cir. 1968); Rule 23(c) (4) (B). The situation may, of course, take on another aspect as discovery proceeds and the case takes shape: if "individual questions arise during the course of litigation, which render the action 'unmanageable' the court still has the power at that time to dismiss the class action and permit the plaintiff to proceed only on behalf of himself." *Eisen, supra*, at p. 566.

Similarly, the defendant's objections with respect to manageability of the action and feasibility of notice may become valid as the action progresses, but at the present time they are only conjectural. As the Second Circuit in *Eisen, supra*, stated in reversing the lower

court and remanding for a factual hearing on these questions:

* * * "the dismissal *in limine* of a particular proceeding as not a proper class action is justified only by a clear showing to that effect and after a proper appraisal of all the factors enumerated on the face of the rule itself." 391 F.2d at 563.

Accordingly, since we think that at this juncture the plaintiff has presented a proper class action, and since it is the better practice in these circumstances to tentatively grant class action treatment, see *Green v. Wolf Corporation*, 406 F.2d 291, 298 fn. 10 (2nd Cir.1968), we will at this time order that a class action may be maintained. At the same time, as previously stated, we reserve all our powers under Rule 23(c) (1) to alter our order or deny class action treatment at any time. *Cf. Advisory Committee Note at 39 F.R.D. 161.* Moreover, we will not approve the sending out of notices until any preliminary motions are disposed of, and until the defendants have had the opportunity, if they desire it, to challenge the substantiality of the plaintiff's case or to again contest the propriety of a class action after all the relevant facts are on the record. 3A Moore's Federal Practice, ¶ 23.45[3]; *Fischer v. Kletz*, 41 F.R.D. 377, 386 (S.D.N.Y.1966).

In the meantime, in order to expedite this case, we will set down for argument in the near future the defendant's objections to plaintiff's interrogatories as well as any other discovery matters then pending. To the same purpose, and to further clarify some of the issues raised in this opinion, we are directing the parties to file factual and legal memoranda on several of these issues.

ORDER

And now, this 23rd day of June, 1970, it is ordered that pursuant to Rule 23(c) (1) this action will be allowed to proceed as a class action subject to our power under that Rule to alter, amend, or add conditions to this order at any future time.

It is further ordered that the plaintiff's motion for a stay of discovery is denied.

It is further ordered that all pending discovery matters will be set down for argument on our next available argument list.

It is further ordered that at some future date to be determined a hearing will be held on the issues of notice and the precise definition and/or limitation of the class or classes.

It is further ordered that at least twenty days in advance of such hearing, the plaintiff shall file a memorandum of law and related facts in this case stating specifically (a) how and by what means he proposes to have the other members of the class he purports to represent pursuant to Rule 23(c) (2) notified; (b) who will bear the cost of such notice; (c) what amount or expense he is prepared to bear if it is decided that the plaintiff must pay for notice; (d) any factual information which he deems relevant to the determination of a manageable class or classes; (e) any proposals which he may have for limiting the size or increasing the manageability of the class; and (f) how in general outline this case should be administered.

It is further ordered that the defendants shall file a reply memorandum at least 5 days in advance of the hearing.

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

IN RE: : M.D.L. DOCKET NO. 45
MASTER KEY ANTITRUST LITIGATION : ALL CASES

MEMORANDUM OF SARGENT & COMPANY IN
OPPOSITION TO CERTIFICATION OF CLASSES

Statement of Facts

These cases concern products installed on doors and openings in a building. The products are generally called "builders hardware" and consist of locksets and latchsets, door closers, butt hinges, fire exit devices, door holders and stops, push and pull plates, kick plates and other miscellaneous items. A lockset is an assembly of parts which include knob, housing, escutcheon (or rose), cylinder and locking mechanism. A latchset is basically the same as a lockset but contains no cylinder or locking mechanism. The locksets installed in a building may be keyed in such a way as to permit a number of locks (some or all of which are keyed differently) to be opened by a single key. Such a key is called a master key, and the arrangement of such a group of locks is sometimes called a master key system.

The defendants in these cases (along with many other companies in the U.S. and the world) are manufacturers of such items of builders hardware. In particular, Sargent & Company manufactures all such items except butt hinges and certain miscellaneous items.

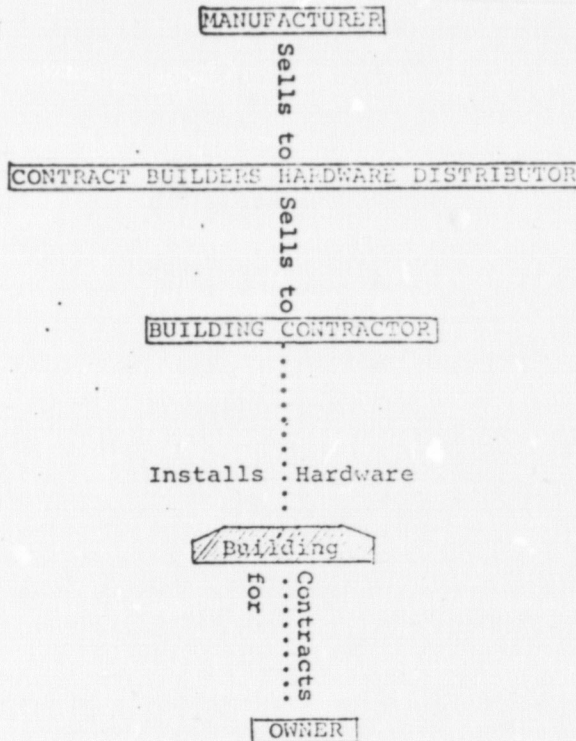
Sargent sells its products to customers which are classified by their function in the distribution process. There

are four basic classifications. Of the four basic classifications, it is the contract builders hardware customer which deals in the kind of hardware with which these cases are concerned. The other classifications include the residential hardware customer, which purchases residential hardware and includes lumber and building supply dealers and wholesale jobbers; special customers which purchase hardware for installation on doors and frames sold as units (the original equipment manufacturer) or which purchase only one or two items of contract or residential hardware; and locksmith and locksmith jobber customers.

The contract builders hardware customer (sometimes called a distributor) purchases builders hardware from Sargent or other manufacturers for use on a particular building job. The building job may be a new building, a remodeled building or an addition to an existing building. The distributors to whom Sargent sells are independent businesses none of which is a subsidiary or affiliate of Sargent.

The contract builders hardware is purchased from Sargent's customers by building contractors. The building contractor has the contract builders hardware installed on the building by a subcontractor or by his own employees. When the owner accepts the completed building from the building contractor, the contract builders hardware has been incorporated into the structure in the same manner as its other components, such as window frames, plumbing fixtures and heating and air conditioning equipment.

Thus the chain of distribution of contract builders hardware may be represented in diagrammatic form as follows:



The owner in this chain of distribution has a contractual relationship only with the building contractor and that contract is for production of a completed structure (or remodeling job) and not for a component part of the structure, such as contract builders hardware.

The plaintiff classes in these actions are alleged to fall into two broad categories. First there are states and other political subdivisions; and second, there are "builder-owners" of apartments, hotels, motels and office and other commercial buildings. All the named plaintiffs allege that they have purchased master key systems from Sargent and the other defendants and some allege that they have purchased other builders hardware.

In fact, the records of Sargent fail to show any purchase

from it of master key systems or other builders hardware by a state or other political subdivision. (See affidavit of Stanley R. Cullen, attached hereto as Exhibit A). While Sargent has no access to the business records of its customers of contract builders hardware (including master key systems), it has reason to believe that none of its customers has sold contract builders hardware to a state or other political subdivision for installation on a new or remodeled building or addition thereto.¹ (See affidavit of John E. O'Keefe attached hereto as Exhibit B).

The records of Sargent also fail to show any purchase from it of master key systems or other builders hardware by any of the named plaintiffs who classify themselves generally as "builder-owners" (i.e. the named plaintiffs in Amherst Leasing Corporation et al vs. Emhart Corp., et al., Berman Construction Corp. et al. v. Emhart Corp. et al. and Sturdy Homes Company et al. v. Eaton, Yale & Towne, Inc. et al.) Sargent has no way of ascertaining from its own records whether any Sargent customers sold master key systems or other builders hardware to any of such named "builder-owners". Sargent, however, has reason to believe (See Exhibit B) that no such named plaintiff and no member of the class of so-called "builder-owners" purchased master key systems or other builders hardware from a Sargent customer.²

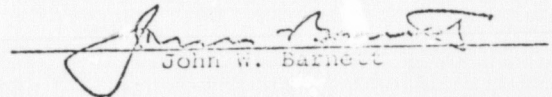
¹Sargent does have information that builders hardware has been sold by its customers directly to states or political subdivisions for replacement material or for use in minor renovation work. However, it should be noted that in such cases the purchaser would have specified the Sargent brand of builders hardware which is available only from authorized Sargent distributors. Thus, assuming arguendo that there were some illegal restraint of trade practiced by Sargent and its distributor, the only appropriate plaintiffs would be those purchasing builders hardware directly from a distributor for replacements or minor renovation work.

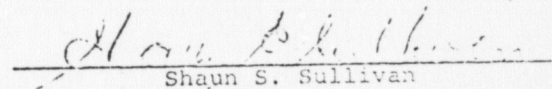
²No plaintiff is described as a building contractor or contractor. Some are described as "builders" but it is impossible to ascertain from this description whether it was meant to include a building contractor. Liason counsel for plaintiffs has, however, indicated in the course of depositions taken in these actions that "builders" and "builder-owners" do not include building contractors.

No member of either of the alleged classes of plaintiffs, therefore, is a purchaser of contract builders hardware from Sargent, nor is any member of either class of plaintiffs a purchaser of contract builders hardware from a customer of Sargent (except in the case referred to footnote 1). In fact, no member of the purported classes of plaintiffs even purchases contract builders hardware as such. Rather it purchases a building (or remodeling job) in which the builders hardware represents from one-half to one percent of the total cost of the job.

THE LAW

The defendant Sargent joins in the Memorandum of all defendants in opposition to certification of classes which sets forth the applicable principles of law.


John W. Barnett


Shaun S. Sullivan

Attorneys for the Defendant,
Sargent & Company
c/o Wiggin & Dana
205 Church Street
New Haven, Connecticut 06518

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

IN RE:) MDL DOCKET NO. 45
)
MASTER KEY ANTITRUST LITIGATION) ALL CASES

AFFIDAVIT OF JOHN E. O'KEEFE

STATE OF CONNECTICUT :
 : ss. West Hartford
COUNTY OF HARTFORD :

JOHN E. O'KEEFE, being duly sworn, deposes and says:

1. I reside at 44 Oak Ridge Lane, West Hartford, Connecticut and am over 21 years of age.
2. I am President of Builders Hardware, Inc., a corporation engaged in the business of selling builders hardware. I have held this position since 1947 and prior thereto was engaged in the various aspects of the sale and distribution of builders hardware since 1936.
3. Among the builders hardware products which Builders Hardware sells and the supplier of each are as follows:

<u>Product</u>	<u>Supplier</u>
Locksets and latchsets	Sargent, Schlage, Falcon, Arrow, Dexter, Heine
Exit devices	Sargent; VonDuprin
Door closers	Sargent, LCN, Norton
Butts and hinges	Stanley, Hager, Lawrence, McKinney
Miscellaneous door hardware	Ives, Dorline, Rixson, Builders Brassworks and others

4. Builders Hardware maintains a place of business at 593 New Park Avenue, West Hartford, Connecticut and has branches

EXHIBIT B

in Hamden, Connecticut, New York, New York and Philadelphia, Pennsylvania, the latter two being operated by corporations which are wholly-owned subsidiaries of Builders Hardware. In the West Hartford office a stock of builders hardware is maintained from which sales are made for replacement parts and small contract jobs.

5. On larger contract jobs hardware is ordered specially for the job from the various suppliers thereof. Such hardware (as well as that which is stocked) is purchased outright by Builders Hardware and then sold by it.

6. Builders Hardware employs a total of 26 persons of whom 10 are engaged principally in the business of selling contract builders hardware. All of those who sell contract builders hardware are trained and experienced in analyzing building plans and specifications and in estimating the hardware requirements for building jobs.

7. In order to secure contract hardware business, Builders Hardware personnel keep abreast of building activity in the areas where it operates. To do so, Builders Hardware subscribes to the daily F. W. Dodge Reports, which report on building activity at all stages, starting from the time any announcement is made of a proposal to build any building. If Builders Hardware learns of a proposal to build a building in any of its areas, either through the Dodge reports or private sources of information, its personnel will call on the architect for the building. In some cases a call may be made on an owner if it is thought that may produce business. Builders Hardware personnel have assisted architects in the preparation of specifications when requested by the architect.

8. When a building job is ready for bid, the architect

may deposit the plans and specifications in a Dodge Plan Room (They are located in Connecticut in Milford and Farmington), where general contractors and the various subcontractors and suppliers of material for the job may examine them and determine whether to bid on aspects of the job. If Builders Hardware decides to quote on the builders hardware for a job, one of its personnel will do a "take off" from the plans and specifications of a detailed list of the builders hardware requirements so that they may be priced. Builders Hardware may then submit to one or more of the general contractors a quotation for the builders hardware. Such a quotation is generally a single price for the entire builders hardware package for the job, and constitutes an offer to sell the builders hardware for the price quoted.

9. After the contract for the building has been awarded, the general contractor which was the successful bidder will make arrangements for purchase of the builders hardware. He may place an order for the hardware at a price earlier quoted but in many cases, he will negotiate a price for the hardware with the hardware supplier. The general contractor will not always place the builders hardware order on the basis of the lowest bid, but may take into account the reliability and skill of the builders hardware dealer and his ability properly to service the job. Builders Hardware (and suppliers of builders hardware generally) do not receive information as to what cost the general contractor has ascribed to the builders hardware in figuring his bid, but there are instances known to Builders Hardware where the general contractor has figured the builders hardware at a cost lower than that quoted to him, with the hope that the lower price can be negotiated with a supplier.

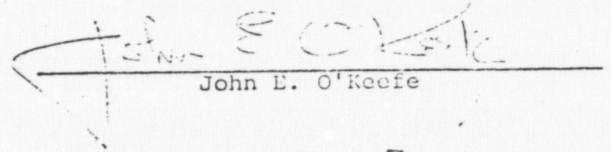
10. If a general contractor places an order with Builders Hardware for the hardware required for the job, Builders Hardware will then order the necessary goods from the manufacturers, or in some instances supply some of it from stock. The price which Builders Hardware pays for the goods will be based on price lists furnished to it by the various manufacturers, although there are some occasions where a lower price will have been negotiated with the manufacturers so as to permit Builders Hardware to quote the job at a price required to obtain it because of competitive conditions. Among suppliers to Builders Hardware, Sargent & Company does grant price concessions from time to time under these competitive conditions.

11. The builders hardware for a job to be supplied by Builders Hardware is shipped to the office and warehouse of Builders Hardware where it is assembled and then delivered to the job site. Installation is done by the forces of the general contractor or his subcontractor.

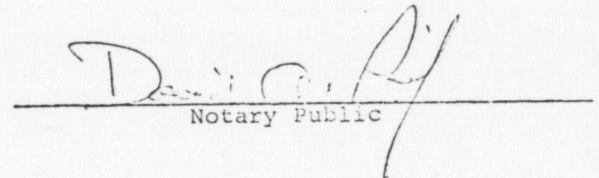
12. The builders hardware will generally constitute one-half to one percent of the total cost of a building. The percentage varies, of course, depending on the number of doors in the building for which builders hardware is required. If Sargent goods are to be supplied for a job those goods will generally constitute from 40% to 50% of the total hardware package.

13. Builders Hardware does not sell hardware directly to the Owner of a building, except in cases where replacement parts are involved or where a small remodeling job may be done by persons employed by the owner.

14. I believe that the method of distribution of contract builders hardware described in the foregoing paragraphs is generally the same for other suppliers of builders hardware like Builders Hardware.


John E. O'Keefe

Subscribed and sworn to before me this 14th day of
February, 1973.


Notary Public

My Commission Expires March 31, 1977

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

IN RE: : M.D.L. DOCKET NO. 45
MASTER KEY ANTITRUST LITIGATION : ALL CASES

AFFIDAVIT OF STANLEY R. CULLEN

STATE OF CONNECTICUT)
: ss. New Haven
COUNTY OF NEW HAVEN)

STANLEY R. CULLEN, being duly sworn, deposes and says:

1. I reside at 4 Windsor Road, North Haven, Connecticut and am over 21 years of age.

2. I am President of Sargent & Company, a manufacturer of builders hardware products, including locksets and latchsets, door closers, fire exit devices, door holders and stops, push and pull plates, kick plates and certain miscellaneous items.

3. Contract builders hardware consists of the hardware products required for the doors and other openings on a building, and in addition to the products listed in Paragraph 2 above which are manufactured by Sargent & Company, includes butt hinges, decorative pulls, automatic door closers, window hardware and other miscellaneous items.

4. Sargent & Company sells the builders hardware it manufactures to customers which are classified according to their respective functions. At the present time Sargent maintains the following classifications of accounts:

Contract builders hardware accounts, which are qualified to purchase contract builders hardware.

Residential hardware accounts, which purchase residential hardware and include lumber and building supply dealers and wholesale jobbers.

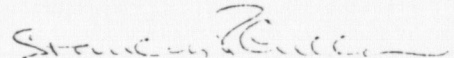
EXHIBIT A

Special accounts which are original equipment manufacturers or which purchase only one or two items of contract or residential builders hardware.

Locksmith and locksmith jobber accounts.

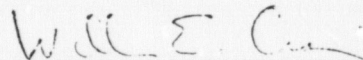
5. Sargent & Company sells contract builders hardware to contract hardware customers, sometimes called distributors, who resell the contract builders hardware at prices which are determined by the distributor.

6. Sargent does not sell builders hardware to customers other than those listed in Paragraph 3 of this Affidavit, except for sales to its own employees which are insignificant in amount. Specifically, it does not sell and has not sold builders hardware directly to owners or builder-owners of buildings or to general contractors who are engaged by owners to construct buildings.



Stanley R. Cullen

Subscribed and sworn to before me this 14th day of February, 1973.



Notary Public

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

IN RE:) MDL DOCKET NO. 45
)
MASTER KEY ANTITRUST LITIGATION) ALL CASES

AFFIDAVIT OF WILLIAM C. LICHTENFELS
ON BEHALF OF DEFENDANT EMHART CORPORATION

STATE OF CONNECTICUT :
 : ss. Bloomfield
COUNTY OF HARTFORD :

WILLIAM C. LICHTENFELS, being duly sworn, deposes and
says:

1. I am over 21 years of age.
2. I believe in the obligation of the oath.
3. I am Vice President-Group Executive of Emhart Corporation.
4. I submit this affidavit on behalf of Emhart Corporation in opposition to Plaintiffs' Memorandum In Support Of All Class Actions.
5. I have personal knowledge of the matters hereinafter referred to, and make this affidavit on the basis of such personal knowledge.
6. One of the Divisions for which I am responsible as Vice President-Group Executive is the Hardware Division of Emhart Corporation.
7. Within the Hardware Division of Emhart Corporation there are two sales divisions known as Russwin and P. & F. Corbin

which sell products under the brand names of "Russwin" and "Corbin". Both the Russwin and P. and F. Corbin (Corbin) sales divisions sell builders hardware.

8. Prior to assuming the position of Vice President-Group Executive of Emhart Corporation, I held various positions within the Hardware Division, beginning in 1951 as a trainee and salesman for the Russwin Division. In addition to having been a Russwin salesman in several states for a number of years, I have held the following positions: Manager of the New York office of Russwin, Assistant General Sales Manager of Russwin, General Sales Manager of Russwin, Vice President of Sales for Russwin, Vice President of Sales and Marketing for the Hardware Division, and Executive Vice President of the Hardware Division. All of my professional life has been spent in the field of builders hardware.

9. By reason of my experience as set forth above, I am familiar with the manner in which builders hardware is sold and the chain of distribution through which builders hardware flows.

10. Russwin and Corbin are separate sales divisions which sell hardware products for the Emhart Corporation. Almost without exception, their contract line of hardware is not sold directly to the end user (owner) of any particular building. Rather the contract hardware manufactured by Emhart and sold by Russwin and Corbin reaches the end user through a chain of distribution.

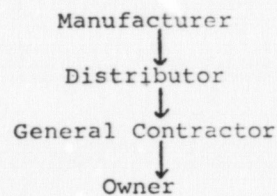
11. There are several facets in the normal sequence of furnishing hardware materials to its final destination. One: the

hardware distributor of the Russwin and Corbin sales divisions, who is an independent contractor, compiles the total hardware requirements by interpreting the architectural specification and quotes a total package price which includes overhead and whatever profit he from his experience feels will make him competitive. Two: the hardware distributor in order to prevent misinterpretation of his quotation must review many sections of the general specifications to assure himself that his firm will not at a later date be held responsible for hardware material specified to be furnished in other related sections. Thus he finds that it is normally necessary to quote to several other sections of the general specifications hardware items relating to those sections and not included in his basic hardware quotation. The sections may or may not be confined to the following related work projects: aluminum doors and frames, glass and glazing, hollow metal doors and frames, miscellaneous metals, electrical and carpentry. The subcontractors of the general contract will then take the hardware supplier's quotation, incorporate it into their total bid and quote the general contractor who in turn submits his quotation for the entire project to the architect or owner. Three: on occasion hardware allowances are included in the general specification. This is a lump sum estimate for finishing hardware inserted by the architect who has not yet decided upon the material necessary yet wishes to allocate a figure for the benefit of the general contractors to use in their bids. At some later date the

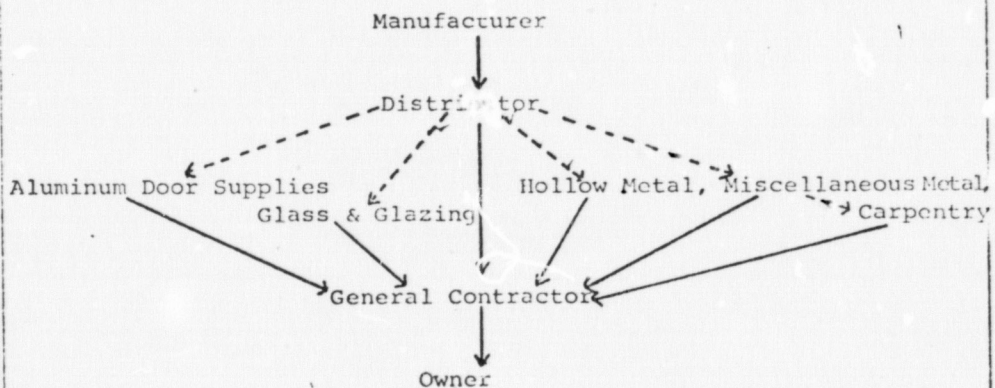
architect will advertise for competitive bids to be submitted on his prepared specifications to the general contractor. Any over-ages in the awarding of the contract are supplied by the owner. Any savings are returned to the owner. Four: there are those instances where all finishing hardware is specified to be furnished by the distributor to a special subcontractor who provides a multi-service quotation to the general contractor.

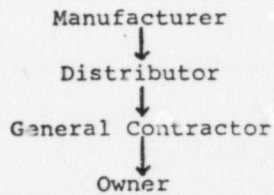
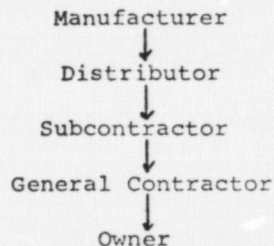
12. The four processes of bidding related above, and the chain of distribution for each process may be set forth in diagrammatic form as follows:

Description of Process I



Description of Process II



Description of Process IIIDescription of Process IV

13. The finishing hardware section of the general specification for a specific building normally includes the following products to provide adequately for the building to which it is attached: floor hinges, pivots, butts and hinges, exit devices, overhead holders, locksets, latchsets, door closers of surface or concealed nature, door stops and bumpers, kick armor and mop plates, numbers or identification plates, bolts of flush or surface type, key cabinets, cabinet hardware, door pulls or push plates of regular and special design, thresholds, door silencers, electromagnetic holders, smoke detectors, sliding door hardware and track for closets and fire doors, shock absorbing type door stays, brackets for handrails and shelving, and other related specialty

items such as weather stripping, coordinating devices and special application hardware.

14. The hardware distributor will then compile his costs for the aforementioned products identified in the hardware specifications and submit his quotations which include overhead and profit. He will normally expect to fill the order if he is successful from the many suppliers who produce the items in his proposed bid. It is generally recognized that no single supplier will be capable of providing all the materials necessary to the hardware specifications. The overhead of the distributor can vary substantially depending upon the location of his suppliers for freight costs, applicable sales taxes, unusual services necessary to fulfill the specifications, and whether or not outside financing is required to fund the project to meet suppliers' payment schedules.

15. The bid of the hardware distributor will normally be a lump sum bid for the entire hardware package. The hardware distributor does not normally submit individual bids on the many different items of builders hardware which he will supply.

16. In the normal chain of distribution, builders hardware is not sold pursuant to a preexisting cost-plus contract or analogous fixed mark-up type of arrangement. The general contractor will receive the quotations of several hardware distributors or related subcontractors based on the hardware products the distributor normally carries. The contractor will then examine

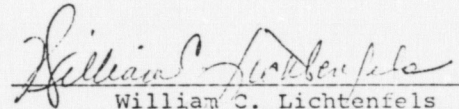
these bids to determine the basis of each bid and the inclusion of any qualifying factors which will affect the basis for equating these bids. In most cases the distributors will pursue the contractor offering substitute suggestions intended to provide a more competitive position and receive the favor of the award.

17. It is to the contractor's advantage to suggest changes to the architect that might not impair the function of the building. To this extent he will take the suggestions of the bidding hardware distributors to provide a lower price to himself which may or may not be passed on to the owner of the project. Many contractors will not take the first submission of competitive bids but will question each supplier on his total package of product, services and price to secure revised lower prices wherever possible. These distributors will then review their costs and contact their supplying manufacturers to see if special consideration can be given to this particular potential order in light of the existing competitive conditions. Due to the highly competitive nature of this product line, Russwin and Corbin are contacted daily by many of their distributors to effect lower prices on their products.

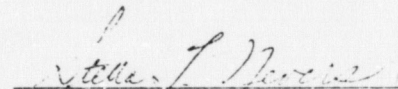
18. In the normal chain of distribution, the general contractor is awarded the contract for the entire structure by a process of competitive bidding. This is almost universally true when the structure is to be constructed for governmental bodies, be they federal, state or local and is true on most private structures.

19. In the situations referred to above, several general contractors will submit competitive bids. As a result, the several hardware distributors will normally submit competitive bids to each of the competing general contractors and/or sub-contractors.

20. The cost of builders hardware in a completed project will vary, although generally the cost would be approximately three-quarters of one percent to one percent of the cost of the structure.


William C. Lichtenfels

Subscribed and sworn to before me this 2nd day of
February, 1973.


Notary Public
My Commission Expires March 31, 1975

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

IN RE: : M.D.L. DOCKET No. 45
MASTER KEY ANTITRUST LITIGATION : All Cases

STATEMENT OF FACTS OF
DEFENDANT EATON CORPORATION

Builders or contract hardware, including hardware used in master key systems, is manufactured by the four defendants as well as other companies who are not defendants nor alleged co-conspirators. Builders or contract hardware is not hammers or nails or paint or any other homogeneous, staple hardware commodity which is simply moved off the dealer's shelf into the customer's hands.

Builders hardware, also called architectural hardware, may be defined as all items which go on a door and which are a part of a finish hardware specification or schedule, such as locks of all types, cylinders, latch sets, push plates, panic devices, hinges, door holders and door closers. Master key systems are specially designed lock systems which allow the locks in a building or a designated section of a building to be opened by a "master key" as well as by the individual key belonging to each door. Contract hardware is to be distinguished from stock hardware or "shelf goods" which is usually sold to wholesalers or jobbers who resell it to the retail hardware store. Rather, builders hardware (of which product line master key systems are but a small and unique part) is a highly technical and specialized product line which requires special knowledge and expertise to market and install.

Eaton sells hardware used in master key systems and other types of builders hardware to contract hardware dealers. The dealer may sell builders hardware to a general or a sub-contractor who installs it in a building under construction. Builders hardware is not sold directly to the plaintiffs by Eaton or Eaton's dealers, and the plaintiffs do not purchase builders hardware per se, but simply purchase buildings containing builders hardware and in some cases, master key systems. See Pantas deposition, page 18; Gray deposition, page 8; Quedenfeld deposition, pages 12, 29.

Eaton's contract hardware dealers are independent businessmen who purchase builders hardware from Eaton at a net price and resell at a mark-up determined by the dealer. Eaton also sells builders hardware to "shelf" dealers who resell the hardware to retail hardware stores, and Eaton sells to "original equipment manufacturers" who utilize hardware as a component part of the product which they manufacture and sell, for example, doors or cabinets. Pantas deposition, page 18; Gray deposition, pages 9 - 10.

The contract hardware dealers do not sell master key systems as such, but the sale of hardware used in such systems, as well as builders hardware in general, is part of a package of hardware and services that are provided by the dealers to their customers. The contract hardware dealer promotes the sale and use of his brand or brands of hardware by calling on architects, contractors and owners, since any of these may decide what hardware will be purchased or used in a particular project.

A person desiring to construct a building begins by retaining an architect or general contractor. Bids on the project are entered by general contractors and included in the figure submitted by the contractor is a lump sum estimate

of the builders hardware cost. The contractor prepares this estimate based on his general knowledge of the cost of builders hardware, or he may prepare it with the assistance of an architectural hardware consultant. After the job is awarded to a general contractor, he will consult a contract hardware dealer or an architectural hardware consultant to prepare the hardware specification for the building. This specification details all the builders hardware to be utilized in the particular building and the cost of the hardware. Once the hardware plans are prepared, bids for this portion of the project are entertained by the general contractor. Whenever government money is involved in the building project, which is the case with most construction today, the specification for the hardware must be such that a minimum of three competing manufacturers' products are acceptable, and generally dealers for several competing brands of hardware are attempting to obtain a particular contract.

As is apparent, the purchaser of the building has nothing to do with the cost of the hardware. It is only after a general contractor has obtained the construction job for a specified sum that the general or sub-contractor obtains specific prices and bids for hardware from a contract hardware dealer. The owner's cost is in no way affected by the cost of the builders hardware. Adon H. Brownell, an architectural hardware consultant and acknowledged dean of the builders hardware field, testified in detail concerning this procedure in United States v Eaton Y. & Towne, Inc., trial transcript, pp. 105 - 107.

The contract hardware dealer who successfully obtained the hardware order will then order the required hardware from the manufacturer whose product line is to be utilized in the

building. The manufacturer ships the hardware to the dealer who must assemble and inspect the hardware, and then deliver it to the job site, marking each lock and other item of hardware to insure installation in the proper place by the contractor's employees. This service requirement further demands that the dealer have a representative visit the job site to cope with the mechanical and technical problems which may arise during installation and which must be overcome before the hardware is accepted.

None of the proposed class members or plaintiffs actually buy builders hardware, but rather, simply purchase buildings in which hardware is one component part. The plaintiffs are no closer to the defendants in these cases than the man who turns the key in the lock of a building. The plaintiffs concede this as they refer to themselves as "end users." Plaintiffs' Memorandum in Support of All Class Actions, page 7.

The cost of builders hardware in the completed project is relatively insignificant. As a rule of thumb, approximately 3/4 of 1% to 1% of a building's cost is likely to represent the cost of the hardware. Locks would represent 1/4 to 1/2 of that sum, and, of course, master key systems would constitute an even smaller amount. Brownell testimony in United States v Eaton Yale & Towne, Inc., page 99.

Walter A. Bates
1144 Union Commerce Building
Cleveland, Ohio 44115
(216) 696-1144
Attorney for Eaton Corporation

Of Counsel
ARTER & HADDEN

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

IN RE:

MASTER KEY ANTITRUST LITIGATION

M. D. L. DOCKET NO. 45

ALL CASES

STATEMENT OF FACTS OF
DEFENDANT ILCO CORPORATION

The following statement of facts is submitted by Ilco Corporation as part of and in support of Memorandum of Defendants Opposing Plaintiffs' Proposed Class Action Order and for Relief Under Rule 56.

The subject matter of this litigation may be generally categorized as builders hardware, that is, those items of hardware typically installed on a door to permit opening, closing and locking. Builders hardware, at least insofar as presently manufactured and sold by Ilco Corporation through its Lockwood division, includes latches, handles, locksets and door closers. A lockset (mortise or cylindrical) consists of lock, cylinder, and related trim including knobs and escutcheon or rose. At one time Lockwood also sold other items of builders hardware including panic devices, bolts and push and pull plates.

Ilco Corporation

Ilco Corporation is the present name of the company formerly known as Independent Lock Company. The Independent Lock Division of Ilco Corporation is the dominant sales vehicle of the corporation and sells a broad line of hardware including key blanks,

- 2 -

key machines, locksmith supplies, night latches, deadlocks, padlocks, auxiliary and residential locks and other miscellaneous shelf or stock hardware. Ilco sells such hardware to locksmith supply distributors, wholesale hardware accounts, stock accounts and original equipment manufacturers.

Lockwood

Builders hardware, more accurately referred to as contract hardware in the context of this litigation, is to be distinguished from the hardware manufactured and sold exclusively through the Independent Lock Division (Ilco) of Ilco Corporation.

Contract hardware is marketed by the Lockwood Division of Ilco Corporation and is sold almost exclusively to specifically designated customers known as contract hardware distributors, or contract hardware accounts. (George E. Wheatley Deposition page 17; Samuel S. Crissman Deposition pages 18-19, 40, 45-46; Robert N. Hicks, Jr. Deposition; and Earl J. Materne Deposition pages 14, 21.) Lockwood may occasionally sell locks of a residential nature or sell hardware to an original equipment manufacturer such as a metal door manufacturer, but the overwhelming majority of its business is the sale of contract hardware to contract hardware distributors.

Lockwood Contract Hardware Distribution

The contract hardware distributor purchases contract hardware from Lockwood and in turn sells it to a building contractor (or subcontractor) for installation in a new building (or an addition to a building), for the construction of which the contractor has a contract with the owner, the end-user. Thus

- 3 -

neither Lockwood nor Lockwood's contract hardware distributor sells hardware directly to the end-user, the building owner.¹ In fact the owner does not purchase hardware as such; he purchases a completed building which contains hardware, in the same way a new homeowner purchases a complete home containing plumbing fixtures rather than purchases the plumbing fixtures as separate items. In some cases this completed building may contain a master key system. It should be remembered that a master key system is not an item of hardware but is a means of controlling access by so designing a group of locksets that all the locks within that group may be operated by a single, or "master", key, as well as each individual lock being operated by its own key.

A description of the process by which contract hardware passes along the chain of distribution reveals many relationships and factors intervening between the manufacturer which produces the hardware and the end-user who owns the building in which the hardware finally comes to rest. The process begins when the owner of the proposed building retains an architect. In the course of planning the building the architect decides whether the hardware should be determined on allowance or by bid. If on allowance, the architect estimates the amount and cost of the hardware to be installed in the building, and this figure is used by the general contractor in bidding to the owner. If by bid, the general contractor often entertains competitive bids on the hardware portion of the project before he submits his bid to the owner.

¹An owner may purchase hardware directly from a distributor as replacement hardware or for very small jobs, but such circumstances are so rare as to be insignificant in terms of a distributor's volume of business.

- 4 -

In either case hardware specifications will have been prepared from the architect's building plans. Generally, hardware specifications are prepared by the architect, a professional contract hardware consultant, a contract hardware salesman or a contract hardware distributor. One of the major factors upon which the contract hardware distributor bases his bid to the general contractor is the hardware specifications. A distributor may submit a bid to several general contractors competing for the award of the same project. As indicated, the general contractor may base his quote to the owner either on the hardware allowance determined by the architect or on earlier bids submitted to him by contract hardware distributors. If the former, the general contractor who is awarded the job accepts bids for hardware from the hardware distributors interested in the job. If the latter, a second round of competitive bidding among hardware distributors may ensue, or as is often the case, the general contractor may negotiate a price with a hardware distributor of his choice.

In both situations the contract hardware distributor sells directly to the general contractor, not to the end-user. Furthermore the distributor's price to the contractor may be reduced two or three times in his effort to obtain the job. The distributor determines his price upon the price at which he purchases the hardware from the manufacturer plus whatever mark-up he feels competitive conditions and other relevant factors will permit. Such factors may include, besides the competition faced by the distributor, the competition faced by the general contractor, the size or complexity of the job, the location of the

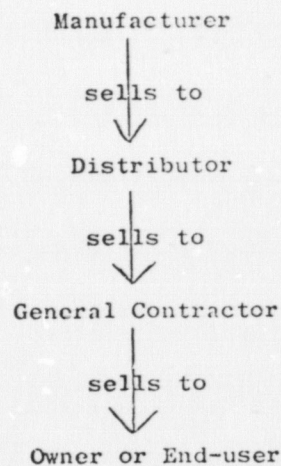
- 5 -

job, service requirements, the distributor's overhead and even the financial condition of the general contractor.

The contract hardware distributor who is selected by the general contractor or subcontractor to furnish the hardware then orders the hardware from the manufacturer or manufacturer whose goods are to be utilized. The manufacturer ships the hardware to either the distributor or the job site, and the distributor's personnel prepare it for installation by the contractor's employees. It should be noted that the cost of hardware in a building may represent from 1/2 of 1% to 1% of the total cost of the building.

Summary

To summarize, the chain of distribution may be diagrammed as follows:



The owner, or end-user, has a contractual relationship only with the general contractor, and the object of that relationship is the purchase of a completed, ready-for-use structure. The only direct purchase of hardware is by the contract hardware

- 6 -

distributor from the manufacturer. Thus it follows that plaintiffs in this litigation, who do not dispute that they are "end-users" (Plaintiffs' Memorandum in Support of All Class Actions, p. 7), neither have contractual relationships with defendant manufacturers nor make any direct purchases of hardware from defendants.

ILCO CORPORATION

By

Charles Donegan
Charles Donegan

James E. Wallace, Jr.,
James E. Wallace, Jr.,

Its attorneys,

Bowditch, Gowetz & Lane

311 Main Street - Suite 200/300

Worcester, Massachusetts 01603

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

IN RE: : M.D.L. DOCKET NO. 45
MASTER KEY ANTITRUST LITIGATION : ALL CASES

AFFIDAVIT OF ROSCOE D. SMITH SUBMITTED BY
DEFENDANTS IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT

STATE OF CONNECTICUT)
 : ss. Naugatuck
COUNTY OF NEW HAVEN)

⁸
May 24, 1973

ROSCOE D. SMITH, being duly sworn, deposes and says as follows:

I am a resident of the State of Connecticut and reside at 50 Woodland Dr., Northford, Connecticut.

I am Executive Vice President and Secretary of W. J. Megin, Inc., ("Megin") whose offices are located at 1247 New Haven Road, Naugatuck, Connecticut.

I have been employed by Megin since 1964 and since 1965 have served as a Vice President.

Megin, a Connecticut corporation, is engaged in business as a general building contractor. For the past three calendar years the volume of new contracts awarded to Megin is shown in the following table:

<u>Year</u>	<u>Volume</u>
1970	\$28,000,000
1971	\$34,000,000
1972	\$26,000,000

Megin is one of the largest general contractors located in the State of Connecticut in volume of business, and in 1972 it ranked 398th in the U.S. in volume of new contracts awarded according to the survey conducted by Engineering News Record.

Megin is awarded many of its contracts in competitive bidding with other general contractors.

When it is decided that Megin will bid on a building contract, it will assemble the data necessary to prepare the bid. Among such data are:

(a) The costs of subcontracts for performing parts of the work not to be done by Megin's own forces, such as the heating, ventilating and air conditioning, electrical and plumbing work.

(b) The cost of purchasing materials to be installed by Megin's own forces. Among such items would be lumber and masonry items, windows and frames, door and frames, and would include builders hardware.

(c) The cost of labor for Megin's own forces. Megin will perform the carpentry on all of its contracts and the masonry on most of them. It will also do some site work.

(d) The items encompassed within the category of "general conditions" under the AIA standard form of agreement between owner and general contractor and overhead.

(e) Megin's profit.

In computing its bid, Megin (and it is believed other substantial general contractors as well) will not calculate its overhead (and general conditions) by simply applying a percentage factor to the sum of other costs, but will take into account

estimates of specific items which will be required for the particular job, such as costs of equipment rental, use of scaffolding, need for heat on the job, telephone service, use of trailers for on-site offices, and other matters.

Similarly, the profit component of the bid will not entail a simple mechanical application of a percentage to total cost. Among the factors taken into account in determining what amount of profit will be calculated into the bid and thus the amount of the total bid include the difficulty of the job, the risk of possible loss, the type of construction, the other contractors on the bidding list and Megin's judgment as to their desire for the work, and the present utilization of Megin's production capacity.

Except where the specifications for the job contain an allowance for a category of materials, Megin will prior to making its bid on the general contract solicit bids from the suppliers of materials. Megin will first seek from the material suppliers an indication of interest to bid on the job by mailing a postcard to all of the suppliers listed in its files which it has found to be reliable. Thereafter, the suppliers will either telephone or write Megin to submit a bid for the supplying of the material.

Among such suppliers will be the distributors of builders hardware. Megin and other general contractors purchase builders hardware from distributors, which are independent businesses, and not directly from the manufacturers. Generally, the builders hardware distributor will bid on the entire package of builders hardware, which includes locksets and latchsets, door closers, exit devices and miscellaneous door hardware. Megin may also solicit from hardware distributors bids which would include items in addition to builders hardware, such as cabinet and bathroom

hardware, metal doors and/or frames, and other items.

As the bids for builders hardware are received only a short time prior to the deadline for submitting the bid for the entire job, Megin does not attempt to analyze the initial builders hardware bids but will simply insert in its own bid calculations the low bid for builders hardware. This is done solely for expediency, since as hardware represents in most cases less than 1% of the cost of the entire job and even a substantial variation in the figure for builders hardware which is factored into Megin's bid will not make any material difference in the total bid which Megin will ultimately submit, and in turn will make no material difference in whether Megin will succeed in being the low bidder.

Megin may select a supplier of builders hardware other than that which earlier submitted the low bid. This is in part because the price of the builders hardware items is in itself not the only factor considered by Megin (and other general contractors) in awarding a contract for the builders hardware. Among other factors are the possible saving to Megin in cost of installation of the hardware by the services provided to the general contractor by the hardware distributor's personnel and the ability of the distributor to service the hardware. Thus Megin may end up paying more or less than the original low bid for builders hardware, depending on all the relevant conditions.

When the specifications provide an allowance for a material item such as builders hardware, no bids are solicited from suppliers prior to the submission of the Megin bid. Instead, the amount of the allowance is used for the builders hardware (or other item). When the contract is awarded, Megin will then obtain bids for the builders hardware and if the price exceeds the allowance,

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the owner will be charged the difference, and if the price is less than the allowance, the owner will be given a credit. When an allowance is used it is not the practice of general contractors to add a mark-up on the price actually paid for the material.

Roscoe D. Smith
ROScoe D. SMITH

Subscribed and sworn to this th24 day of May, 1973,
before me.

Charles T. Worinn
Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

In re: : M.D.L. DOCKET
MASTER KEY ANTITRUST LITIGATION : No. 45 - ALL CASES

AFFIDAVIT OF WILLIAM C. MAHER

STATE OF ILLINOIS)
COUNTY OF COOK) ss. Bensenville May 29 , 1973

WILLIAM C. MAHER, being duly sworn, deposes and says:

1. I am over 21 years of age.
2. I believe in the obligation of the oath.
3. I am currently Vice President of Illini Hardware Corporation, 1321 Irving Park Road, Bensenville, Illinois, and have been employed by Illini Hardware Corporation for approximately six years.
4. Prior to my current employment I was the manager of the Chicago office of the Russwin Division of the Hardware Division of Emhart Corporation. I have been engaged in the contract hardware industry since 1958.
5. Illini Hardware Corporation is a distributor of contract hardware, which it purchases from manufacturers (or through representatives of manufacturers) and which it resells to third parties, such as subcontractors, general contractors, builders-owners and owners of structures.
6. Illini Hardware Corporation handles and sells the hardware of approximately 140 different manufacturers.

7. Illini Hardware Corporation handles and sells master key systems manufactured by Schlage (Schlage Lock Company), Russwin (Emhart Corporation) and Falcon (Falcon Lock Company). The Schlage, Russwin and Falcon master key systems are roughly equivalent in quality, and are sold in competition with each other and with other competing master key systems which Illini Hardware Corporation does not handle on a regular basis.

8. When a new structure, such as an office building or a school is to be constructed, the various general contractors who are interested in bidding the project will receive quotations for the contract hardware portion of the structure from various contract hardware distributors, such as Illini Hardware Corporation.

9. In such instances, the contract hardware for the structure will be bid as a package, such that the bid is a lump sum bid for all of the contract hardware for the structure.

10. Because the hardware is bid as a package, the distributor's lump sum bid price will consist of a single price for the products of several manufacturers. For example, the distributor may buy the locks from one manufacturer, the door closers from a second manufacturer, the exit bolts from a third manufacturer, the hinges from a fourth manufacturer, the door stops from a fifth manufacturer, the push, pull and kick plates from a sixth manufacturer, the cabinet hardware from a seventh manufacturer, etc. The vast variation in terms of products and manufacturers is evidenced by the fact that Illini Hardware Corporation handles and sells the products of approximately 140 different manufacturers.

11. The material cost to each distributor for the hardware package will vary, depending on which products he elects to use, their net price, and whether he receives a discount from one or

more manufacturers on the particular job. In addition, the overhead and interest costs of each distributor vary, as does the percentage of anticipated profit which he is willing to accept on each particular job. Because of these factors, the package bid prices of the various distributors will differ.

12. In determining what bid price to put on any given hardware package, Illini Hardware Corporation considers all of the factors set forth in paragraph 11, and in addition, considers the anticipated bid prices of competing hardware distributors. This is so because the Illini Hardware Corporation must have the lowest package price to be awarded the contract.

13. For the above reasons, there is no standard markup or standard rule of thumb for a markup for any one item or the package of items on any package bid for contract hardware by a distributor.

14. The figure which is determinative of whether the contract hardware distributor is awarded the contract is the lump sum price for the hardware package, and because all of the factors enumerated above go into determining that lump sum price, it is almost impossible on any one job in competitive bidding to assign a percentage of markup over material cost for any one type of hardware or for the hardware purchased from any one manufacturer. Stated another way, it would be extremely difficult if not impossible to trace the dollar amount or percentage of markup over material cost for a given product on an individual job, even if the records relating to the bidding of the job were still available. If such records were not available, and Illini Hardware Corporation does not maintain such records for longer than completion of the job if it wins the contract, it would be impossible to determine the amount of such markup.

15. Because each job is priced and bid on an individual

basis, with a separate determination as to product cost (net prices are continually subject to change), discounts (which are allowed on a job by job basis), markup (which constantly changes), interest costs (which fluctuate), and competitive conditions (which change according to the volume of building activity, backlog of competing hardware distributors, reduction or increase in overhead of competitors, etc.), it would be totally impossible to assign a "normal" or "average" markup over material cost for any one type of hardware or for the hardware purchased from any one manufacturer.

16. Contract hardware distributors do not normally deal with general contractors on the basis of a pre-existing cost-plus contract.

17. Contract hardware distributors are obligated to pay the hardware manufacturers within 30 days after the hardware is shopped from the manufacturer, but do not receive payment from the contractor until the hardware is accepted. Contract hardware distributors are therefore frequently obligated to borrow money to pay the manufacturers, and cannot repay the loan until payment is received from the general contractor. During that period the contract hardware distributor must pay interest on the face amount of the loan, and the anticipated amount of the interest must be considered when arriving at the amount of the package bid for hardware.

18. Some general contractors take longer to pay the contract hardware distributor than do other general contractors. Because a longer period to be paid by a general contractor will result in increased interest costs to the contract hardware distributor, contract hardware distributors may bid a higher package price to general contractors who are less prompt in paying for the hardware. This means that the hardware distributor will often quote

different prices for the same package of hardware to different general contractors, and in turn those general contractors will have different material costs for the contract hardware.

19. Contract hardware distributors may also submit a higher package bid to a general contractor which in their opinion has an uncertain credit standing, or which has in the past unfairly "back charged" the distributor for materials supplied.

20. After a general contractor is awarded the contract for the structure, it is customary for the general contractor to go back to one or more of the contract hardware distributors in an effort to secure a price for the hardware package which is lower than the lowest hardware package bid received by the general contractor before the general contract is awarded. And customarily the general contractor is successful in obtaining a lower price for the hardware package, whether by negotiation with the contract hardware distributor who submitted the lowest package bid, or by negotiation or "bid peddling" with one or more additional contract hardware distributors.

21. When contract hardware distributors reduce the package price to the general contractor pursuant to such "negotiation" or "bid peddling," such reduction is in the form of a specific dollar amount off the package bid price originally submitted. The reduction is not, nor could it realistically be, allocated to any particular product within the hardware bid package. This factor would further complicate any effort to trace or compute the dollar or percentage markup over material cost as to any individual product or the products of any single manufacturer.

22. There are some general contractors who do not make it a practice to "negotiate" or "peddle" the package bids of the contract hardware distributors, but rather accept the lowest contract hardware package bid received before the general contract

is awarded. Contract hardware distributors will bid a lower package bid price to those contractors than to general contractors who "peddle" the bids, because (a) they know that they will not have to lower their bid price and (b) they know that their competing hardware distributors will also bid a lower package bid price to those general contractors for the same reason.

23. If all general contractors abstained from "negotiating" or "peddling" the lowest hardware package bid after award of the general contract, then competing hardware distributors would submit lower package bid prices to the various general contractors. Again, this would be because (a) all contract hardware distributors would know that they would not be asked to reduce their package bid price after award of the general contract and (b) each hardware distributor would know that its competition would submit its lowest bid at the initial bidding stage, instead of the practice of submitting a higher initial bid with the expectation of lowering that bid during negotiations with the successful general contractor at a later date.

24. This practice of "negotiating" or "bid peddling" by the general contractor after award of the general contract is widespread in the industry. Because of its prevalence, contract hardware distributors often refer to their initial package bid as the "going in bid." Many hardware manufacturers will not consider granting any discounts until after the "going in bid," and wait until the "negotiation" or "bid peddling" stage to consider whether the true competitive situation warrants a discount to contract hardware distributors.

25. It is impossible for a contract hardware distributor to determine the amount of his profit - whether gross or net - at the time he submits his "going in" package hardware bid. His profit can only be determined after the job has been completed

and he has been paid all moneys which he will receive. This is so because of the following factors which determine profit and which intervene between the time of the "going in" package bid and final payment:

- (a) actual package price after "negotiation" or "bid peddling" which will be lower than the "going-in" package bid;
- (b) discounts granted by manufacturers during the bid peddling" process;
- (c) possible substitution of product if the product originally specified is not accepted;
- (d) amount of interest paid for moneys by the distributor, which is a function of both the length of time during which interest must be paid and any changes in the applicable interest rate during such time;
- (e) cost of overhead, in that experienced overhead costs will normally differ from anticipated overhead costs; and
- (f) amount of back charges.

26. Even after final payment the distributor will not know his profit on a given job, because he may be required to service the job, and correct any problems which may arise with the hardware long after final payment has been made. The distributor is not separately compensated for this service: he is expected to perform this function free of charge and he must consider this fact when he is determining the package price for the hardware.

27. It is not possible to allocate the costs of servicing a job to any particular product in the hardware package, nor is it possible to allocate the costs evenly among the different products, because some require little, if any, servicing (for example, door stops), and others (such as door closers) may or

may not require servicing, depending on the experience on any given job, which is not known when the package price is established.

28. Because of the factors mentioned above, it would not be possible to state that a contract hardware distributor, assuming he was illegally overcharged 5% by a manufacturer of a product or group of products, would bid higher than if he had not been charged the additional 5%. Conversely, it would not be possible to state that a contract hardware distributor would bid at a lower price if his price from the manufacturer of a product or group of products were 5% less. A 5% higher or lower price as to one product in the package would in most cases not be very significant in terms of the cost of the entire package. Additionally, a distributor must consider the anticipated bid prices of his competitors, and must make his bid sufficiently low so as to meet or beat his competitor's price. In the Master Key Antitrust Litigation, I understand that Emhart (Russwin) is alleged to have illegally conspired with the effect of raising its prices artificially, but that no such claims are made as to two of its competitors, Schlage and Falcon. If a distributor were to bid Russwin locksets against a competing distributor who was bidding Schlage locksets, the Russwin distributor, if he were to win the job, could not bid more than the Schlage distributor. So whatever the price to the Russwin distributor, he must see that his total package bid price is no higher than that of the Schlage distributor or he will not make the sale.

29. To take a very oversimplified example, I will assume that there are only two competing contract hardware distributors, one of which offers Schlage locksets, the other of which offers Russwin locksets. Further assume that each distributor offers to provide identical products for all other hardware, and receives

(if any) identical discounts from hardware manufacturers, and that the overhead of each distributor is identical. The general contractor in such a situation will accept the lower package price. I assume for purposes of this example that the Russwin price for locksets is artificially inflated by 5% over the price for locksets of Schlage. In order for the Russwin distributor to secure the order, he must meet or beat the package price offered by the Schlage distributor. If he does not meet or beat the price, he will lose the contract, and because there is no sale, there is no overcharge to the general contractor. If the Russwin distributor meets or beats the package price of the Schlage distributor and wins the job, he would have to lower his profit margin to less than that of the Schlage distributor to offset the higher material cost, in which case any "overcharge" would not be passed on to the general contractor, but would be absorbed by the contract hardware distributor.

30. There are occasions in which the general contractor will not deal directly with the contract hardware distributor at all, but will rather deal directly with a subcontractor who in turn deals with the contract hardware distributor. This adds another entity in the chain of distribution of contract hardware.

31. There are other occasions in which the general contractor will deal directly with the contract hardware distributor with regard to a portion, but not all, of the hardware required for a structure. For example, the subcontract for hollow metal doors and frames, or glass and glazing, or partitions may specify items of hardware. In such instances, the contract hardware distributor will deal directly with the general contractor on some items of hardware, and will deal directly with the subcontractor on other items of hardware.

32. On other occasions, the contract hardware distributor

will deal only with the architect, as for example where an "allowance" for hardware is specified.

33. On still other occasions, the contract hardware distributor will deal directly with the owner of the structure. One example would be on replacement hardware for an existing structure.

34. And on still other occasions, the contract hardware distributor will deal directly with builders-owners of structures, where any will act both as a contractor and owner for a new facility such as an apartment house or an office building.

35. Normally contract hardware distributors, in determining the package bid price, will figure jobs on the basis of a detailed take-off of the hardware specifications. But there are occasions where time does not permit such an analysis, and as I testified in my deposition (page 65) on examination by Mr. Freeman:

Q. Did the distributors figure jobs on the basis of the book prices they received for contract hardware?

A. Yes.

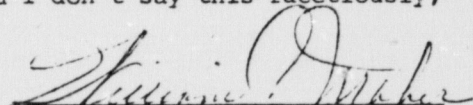
Q. Is there any other way to figure a job?

A. Yes.

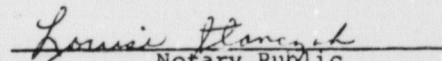
Q. How?

A. Well, if you can [sic] make a detailed take-off and time is of the essence and you don't have enough time to make a take-off, you can go by using a percentage figure of the building.

You can also, and I don't say this facetiously, you can weigh the plans.


William C. Maher

Subscribed and sworn to before me this 24th day of May, 1973.


Notary Public

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

AFFIDAVIT OF FRANCIS DUROCHER

FRANCIS DUROCHER, being first duly sworn deposes and says as follows:

I am a resident of Cook County, Illinois, and reside at

Rural Route #1, German Church Road, Hinsdale, Illinois

I am Vice President for Gust K. Newberg Construction Company whose offices are located at 110 South Dearborn Street, Chicago, Illinois 60603. I am employed by Gust K. Newberg since 1940, and have been in my present position since 1957.

Gust K. Newberg is engaged in business as a general building contractor and is engaged in construction throughout the United States. The annual volume of work performed by Gust K. Newberg exceeds \$100 million.

If Gust K. Newberg decides to bid as general contractor for a construction project involving the installation of builders hardware, we normally issue invitations to bid to several hardware distributors. As a result of the invitations we will normally receive five or six different bids for the hardware from competing distributors although occasionally we will receive three bids or less. Several competing hardware manufacturers are usually represented by the bids received for a particular project.

For estimating purposes, the cost of builders hardware can vary from a low of one-half of one percent of the total cost of a construc-

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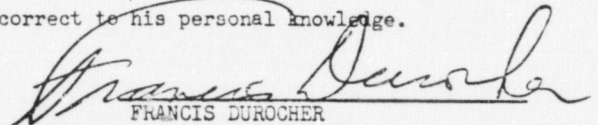
tion project to a high of three percent of those costs. Usually, we would anticipate that hardware would represent approximately one percent of the total cost of a project and builders hardware is one of the material costs involved in estimating such a project. Based on our experience, we know approximately what the builders hardware should cost for any given project. If bids are received which are out of line on costs, we as a general contractor have no hesitation about going back to the bidders for a lower price or to different distributors to obtain more reasonable bids.

The selection of a brand of hardware for a particular project is generally left up to the owner or architect. Most specifications and architectural plans for a project specify a particular brand "or equal" brand of hardware. Therefore, if bids to supply the named brand in the specifications are higher than an equal brand we will occasionally recommend to the owner or architect the substitution of a less expensive brand. Occasionally the owner or architect will specify a particular brand initially with no substitution allowed, and of course we are bound by their decision. In analyzing hardware bids we consider not only the cost of the hardware but other factors such as our experience with the distributor involved, the lead time necessary for ordering and purchasing the hardware, and the services to be performed, since these factors are equally important to the general contractor. Based upon these factors we recommend to the owner or architect which distributor, or in some cases which subcontractor, from whom to purchase the builders hardware for the project. Our recommendations in this respect are usually followed.

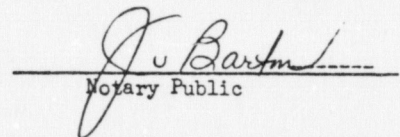
No single factor determines either our profit or the final cost of the building to the purchaser of the building. These amounts vary depending upon the interaction of the cost of all the materials and components, of which builders hardware is only one element, and the amount of fair mark up which we are able to put on a project.

Variations in the cost of builders hardware to us would not always be reflected in our price to the building owner. For example, if the price of the hardware increased or decreased between the time Gust K. Newberg was approved as general contractor and the time we let a sub-contract for the work, we would not normally pass the increase or decrease along to the owner; rather we would absorb the profit or loss ourselves. Since materials costs for building projects are constantly fluctuating, it is virtually impossible to say that a price change in a product representing one percent of a builders cost on a lump sum contract would be equally reflected or passed on in our final price to the owner.

The affiant further states that the statements of fact contained in this affidavit are true and correct to his personal knowledge.


FRANCIS DUROCHER

Subscribed and sworn to before me this 3 day of May 1973.


Notary Public

STATE OF CONNECTICUT)
COUNTY OF NEW HAVEN) ss:

- (a) The cost of the material to be used on the job.
- (b) The cost of Macomber's own labor force.
- (c) The cost for the work to be performed by the various subcontractors.

- (d) The overhead costs included in the AIA general conditions which are direct charges to the job. For example, the cost of power and water for the building site.
- (e) The cost of other items of overhead not directly chargeable to the job.
- (f) The company's anticipated profit on the job.

4. Macomber's overhead varies from job to job since it is dependent upon a number of changing factors. For example, the cost of heating the job site varies significantly from season to season.

5. By the same token, the figure to be inserted in the bid sheet as Macomber's profit factor varies significantly from job to job and cannot be arrived at by the utilization of any mechanical formula or fixed markup. When computing its profit component for the bid, Macomber takes into consideration, among other things, the quality of the plans and specifications, its estimate of the bids of other general contractors, the kind of year it is having, and the present utilization of Macomber's equipment and work force. None of these factors are controlling but they all influence Macomber's judgment on what to include as its profit figure in the bid sheet.

6. In filling out a bid sheet Macomber figures the cost of its materials on the basis of price quotes except where the architect has established an allowance for a particular class of material.

7. Macomber keeps a current list of suppliers of various building materials, including builders hardware.

Assuming the cost of a particular item is to be fixed on the basis of price quotes, Macomber sends out postcards to the various suppliers requesting bids.

8. Macomber solicits its builders hardware bids from independent distributors. The builders hardware is generally bid as a package, that is, the distributor will quote one price that includes the locksets, exit devices, door closers, etc., and the quoted hardware package usually includes items manufactured by a number of different companies. Depending on the size of the job, Macomber may solicit hardware bids for its Connecticut jobs from as far away as Boston and New York. The builders hardware bids received by Macomber usually vary from distributor to distributor since the distributor's bid includes a number of variables including his markup for overhead and profit.

9. Macomber does not always obtain its builders hardware from a builders hardware distributor. In certain cases Macomber may obtain the necessary builders hardware from a subcontractor on the job. For example, in apartment house construction the plans may call for the use of hollow metal doors and, in that case, the locksets are purchased as part of the hollow metal doors. In such a case the cost of the builders hardware is included as part of the door subcontract in the bid sheet.

10. Macomber normally just checks the builders hardware bids to make sure they are complete and inserts the low builders hardware bid in its bid sheet. This is done primarily because the cost of the builders hardware is usually less than 1% of the cost of the entire building and the general contractor's efforts, of necessity, are directed towards those items that

will have a measurable influence on the amount of its total bid. Attached hereto are the summary cost sheets for three fairly typical jobs of Macomber. Exhibit A is a research laboratory that was constructed in 1964, Exhibit B is a building composed of offices and classrooms that was built in 1964, and Exhibit C is an arts center which is presently under construction. In each case, the cost of the builders hardware is less than 1% of the total cost of the building.

11. In compiling a competitive bid, Macomber attempts to estimate as accurately as it can its anticipated material costs for that job. In some cases Macomber will receive bids from certain suppliers, including hardware distributors, where for one reason or another Macomber concludes that the bid is too high or too low and, in those situations, Macomber will include in its bid what Macomber believes will be the true cost to it of the material.

12. Should Macomber be awarded the general contract, it will then negotiate with the material suppliers for final prices and in many cases those final prices will be lower than the prices Macomber included in its bid sheet. In the case of builders hardware, Macomber may not obtain the material from the distributor that submitted the low bid since cost is only one factor that is considered by Macomber when choosing the builders hardware supplier for the job. The cost of installing the builders hardware may in some cases equal the cost of the hardware itself and the possible savings to Macomber on the installation of the hardware is an important consideration. The willingness of a hardware distributor to service a job after

the hardware is installed is also important since again it can result in possible savings to the general contractor. Macomber's actual cost for the builders hardware, therefore, may be higher or lower than the original figure it inserted in its bid sheet.

13. While it is true that Macomber will never submit a bid less than its estimated costs, possible changes in Macomber's material costs is a factor it considers when initially arriving at the figure it will insert as its profit component on the bid sheet.

14. An allowance for an item on the bid sheet usually is employed in situations where the detailed information necessary to obtain price quotations for a particular item is unavailable when the bid sheet is being prepared. The amount of the allowance for the item is set by the architect. Any difference between the ultimate cost of the hardware and the allowance will be reflected in the form of a debit or credit to the owner as the case may be.

KENNETH FROBERG

Sworn to before me this

day of , 1973.

Notary Public

	LABOR	INSURANCE	MATERIAL	SUB-TOTALS	\$ GRAND TOTAL
1. General Conditions	32,671	4,411	12,522	49,604	2.17
2. Plant & Equipment	6,048	816	23,665	30,529	1.52
4. Excavation	8,772	1,184	788	10,744	0.54
4. Excavation - Sub	-	-	61,466	61,466	3.07
6. Site Work	1,106	149	943	2,198	0.11
8. Foundations	22,992	3,104	36,091	62,187	3.10
9. Superstructure	88,921	12,004	38,729	139,654	6.97
10. Masonry	38,008	5,131	13,938	57,077	2.85
11. Cement Work & Paving	17,958	2,424	12,105	32,487	1.62
13. Waterproofing	95	13	67	175	0.01
13. Waterproofing - Sub	-	-	13,782	13,782	0.69
14. Reinforcing	292	39	557	888	0.04
14. Reinforcing - Sub	-	-	94,666	94,666	4.73
19. Rough Carpentry	2,538	343	496	3,377	0.17
20. Millwork	9,589	1,295	1,232	12,116	0.61
20. Millwork - Sub	-	-	33,175	33,175	1.66
22. Misc	560	76	319	955	0.05
22. Misc - Sub	-	-	63,015	63,015	3.15
23. Lounge	1,153	156	284	1,593	0.08
24. Metal Door Bucks	5,042	681	544	6,267	0.31
24. Metal Door Bucks - Sub	-	-	15,255	15,255	0.76
25. Toilet Partitions	-	-	1,673	1,673	0.03
26. Metal Windows	-	-	20,722	20,722	1.03
28. Soft Floor	-	-	20,078	20,078	1.00
29. Mesh Ceilings	-	-	895	895	0.04
29. Plastering	-	-	8,934	8,934	0.45
30. Hardware	-	-	11,038	11,038	0.55
31. Glass	-	-	19,031	19,031	0.95
32. Roofing	-	-	16,470	16,470	0.82
33. Painting	-	-	24,717	24,717	1.23
34. Marble	-	-	67,194	67,194	3.35
36. Plumbing & Heating	-	-	422,999	422,999	21.11
39. Electric	-	-	270,595	270,595	13.52
41. Elevator	-	-	45,498	45,498	2.27
42. Insulation	-	-	16,045	16,045	0.80
44. Incinerator	56	8	246	246	0.02
44. Incin.Lab.Equip.& Chk.Ed.	-	-	173,458	173,458	8.66
45. Macostrut Partition	15,092	2,037	38,062	55,701	2.78
45. Lead X-Ray	-	-	3,100	3,100	0.15
47. Insul. Panels	-	-	55,817	55,817	2.79
51. Precast Conc. Covers	-	-	2,811	2,811	0.14
Fee				75,000	3.75
GRAND TOTAL				1,928,322	100.00
GRAND TOTAL PLUS FEE				2,003,322	

MONTHLY COST REPORT

	<u>Contract Breakdown</u>	<u>Total Anticipated Costs</u>
General Conditions	\$ 205,000.	\$ 248,000.
Plant & Equipment	170,000.	220,000.
Excavation, Utilities	98,000.	98,000.
Sheet-Pile-UnderPin	100,000.	98,500.
Site Work	10,000.	9,000.
Foundations-Footings	30,000.	31,000.
Superstructures	632,000.	780,000.
Slab on Ground	15,000.	14,000.
Waterproof-Caulk	6,000.	5,500.
Reinf. Steel	210,000.	200,000.
Carpentry, Millwork, Doors	75,000.	92,000.
Orn. & Misc. Iron	142,000.	155,000.
Steel Sash	6,000.	5,500.
Toilet Partitions	3,000.	3,000.
Lath & Plaster	18,000.	-
<u>Hardware-Toilet Access. - ALLOW.</u>	<u>15,000.</u>	<u>22,000.</u>
Glass	70,000.	80,000.
Roofing, Skylights, Flashing	40,000.	30,000.
Paint	25,000.	17,000.
Slate	29,000.	8,200.
Plumbing, Heating, Vent.	415,000.	414,236.
Electric	245,000.	242,000.
Elevators, Lift	62,000.	62,311.
Acoustical	40,000.	44,460.
Misc.	20,000.	23,000.
Library Stacks	16,000.	15,954.
Metal Lockers	1,700.	-
Seating - ALLOWANCE	7,500.	5,292.
Thermal Insulation	20,000.	21,000.
Insulating Roof Fill	3,000.	4,300.
	<u>2,729,000.</u>	
Contingency	50,000.	
Fixed Fee	120,000.	95,235.
CONTRACT	2,099,000.	3,134,597.
<u>Change Orders:</u>		
Changes 1 to 6	215,218.	
Changes Pending	<u>20,377.</u>	
	\$ 3,134,597.	

82A DESCRIPTION	LABOR COST	MATERIAL COST	CONTRACT TO DATE	LABOR COST	MATERIAL COST	CONTRACT TO DATE
10 General Conditions	11621	34110	45731	203000	80000	283000
20 Plant & Equipment	30664	124565	156121	72557	201100	273657
30 Excavation	12756	2652	15668	34113	867	35080
40 Excavation-Machine		199458	199458		202001	222000
50 Site Improvements	25017	45117	70134	56561	15000	51561
60 Form Work	528803	153345	682148	204085	163000	867085
70 Reinforcing Steel	132165	100244	232409	103805	142650	246455
80 Concrete-C.I.P.	24915	169154	200069	97572	140810	238672
90 Masonry	11805	6595	21400	17573	4728	22311
100 Structural		126700	136150		156329	156329
110 Miscellaneous Metal	10893	104521	115524	6257	92330	98587
120 Rough Carpentry	13767	2700	15267	12415	5600	18065
130 Finish Carpentry	14191	1377	15568	21200		21200
140 Millwork		17570	17570		31700	21770
150 Waterproofing		2242	2242		20015	20015
160 Thermal Insulation		1718	3572		1215	1215
170 Roofing, Sheetmetal		5974	5974		32586	32586
180 Roof Accessories		18193	18193		153073	153073
190 Metal Doors & Frames		6756	6756		6756	6756
200 Erect Doors & Frames	4975	700	5675	2427		2427
210 Wood Doors						
220 Fire Doors		1065	1065		1246	1246
230 Metal Windows		10324	10324		105254	105254
240 Finish Hardware		14785	14785		150350	150350
250 Glass & Glazing		4761	4761		1180	1180
260 Lath & Plaster		2400	2400			
270 Cynema Drywall		11210	11210		105375	105375
280 Tile Work		49750	49750		52670	52670
290 Acoustical		20731	20731		21600	21600
300 Wood Flooring		17666	17666		15790	15790
310 Painting		42415	42415		47100	47100
320 Tackboards, Chalkboards		5200	5200		3490	3490
330 Compartments		1550	1550		1550	1550
340 Identifying Devices		1000	1000			
350 Kitchen Equipment		4461	4461	85	4584	4584
360 Kitchenette Unit		75	75			
370 Seating		46324	46324		44711	44711
380 Pit Lift		35772	35772		35273	35273
390 Elevators		25777	25777		34754	34754
400 Pouring, H.W.C. Sprink.		636573	636573		636573	636573
410 Electric		491957	491957		491957	491957
420 Insurance Taxes, H.I.		20000	20000		245400	245400
430 Stage Rigging	01	148792	148792		148792	148792
440 Stage Lighting	02					
450 House Lights	03					
460 Sound, Intercom	04					
Toilet Rooms		2535	2535		2537	2537
Entrance					668	668
TOTALS	203000	3324744	4318734	1312513	2451663	4765176
Contingency						
Etc.						126263
ACTUAL CONTRACT TO DATE						

TURN CC # 98

INCLUD CC # 84

CC # 84 - 90 - 76

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

IN RE: :
: :
MASTER KEY ANTITRUST :
LITIGATION :

M.D.L. Docket No. 25

ALL CASES
U.S. DISTRICT COURT
HARTFORD, CONNECTICUT

FILED
AUG 29 2 51 PM '73

RULING ON MOTION
FOR SUMMARY JUDGMENT

This litigation, consolidated under the multidistrict procedures for pretrial proceedings, see 28 U.S.C. § 1407, is brought by several states and cities (the governmental plaintiffs), as well as numerous private owners and builders-owners, who have purchased contract or builders' hardware from the four defendants. Contract hardware consists of the hardware components used on doors of buildings - locks, latches, keys, closers, stops, etc. Plaintiffs allege that the defendants, in concert with their distributors,^{1/} engaged in a horizontal conspiracy to fix prices for contract hardware, and further that vertically by a system of territorial and customer market division among their distributors the several defendants maintained price levels higher than what free competition would have established. They seek treble damages for this violation of the antitrust laws under

^{1/} For purposes of this motion, manufacturers and distributors will be considered as one entity. They are tightly linked together at the top of the chain of distribution.

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Section 4 of the Clayton Act, 15 U.S.C. § 15.^{2/} The governmental plaintiffs did not purchase the hardware directly from the defendants or their distributors. However, they allege that they were the actual victims of the conspiracy, for the overcharges exacted by the defendants were directly reflected in the price they had to pay for the buildings they purchased. The defendants have moved for summary judgment on the ground that these plaintiffs are "remote claimants" whose interests do not come under the protective umbrella of Section 4.

I.

Since the word "standing" was used somewhat loosely by both sides during oral argument, it is important to state the defendants' position as precisely as possible. They do not contend that the governmental plaintiffs have not suffered injury "in (their) business or property by reason of anything forbidden in the antitrust laws." Indeed, given the Supreme Court's implicit approval in Hawaii v. Standard

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15 U.S.C. § 15 provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

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Oil Co., 405 U.S. 251, 266 (1972), of class actions by a state on behalf of its consumer citizens, who were far more "remote" from the manufacturers' products such as gasoline and liquid asphalt than any of the plaintiffs in this action,^{3/} that claim would be without merit.^{4/} The essence of their argument is rather that, as ultimate or indirect purchasers, the governmental plaintiffs, in contrast to contractors who dealt directly with the defendants, will be unable to prove their damages. To support their position, defendants rely primarily on Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) (Hanover), and several cases which have purported to follow it, notably Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13 (E.D. Pa. 1970), aff'd per curiam sub nom. Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971) (Mangano).

At first blush, and also on more thorough analysis, this argument is a peculiar reading of Hanover. In that case,

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See, for example, the intricate chain of distribution of gasoline described in Perkins v. Standard Oil Co., 395 U.S. 642, 645 (1969).

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See also, State of West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971); State of Illinois v. Bristol-Myers Co., CCH Trade Cases, para. 74,262 (D.C. Cir., Dec. 7, 1972).

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"(t)he District Court found that Hanover would have bought rather than leased from United had it been given the opportunity to do so. The District Court determined that if United had sold its important machines, the cost to Hanover would have been less than the rental paid for leasing these same machines. This difference in cost, trebled, is the judgment awarded to Hanover in the District Court. United claims, however, that Hanover suffered no legally cognizable injury, contending that the illegal overcharge during the damage period was reflected in the price charged for shoes sold by Hanover to its customers and that Hanover, if it had bought machines at lower prices, would have charged less and made no more profit than it made by leasing. At the very least, United urges, the District Court should have determined on the evidence offered whether these contentions were correct. The Court of Appeals, like the District Court, rejected this assertion of the so-called 'passing-on' defense, and we affirm that judgment." 392 U.S. at 487-88 (footnotes omitted).

The Court offered two reasons for its rejection of the passing-on defense. It foresaw a great increase in complexity of antitrust litigation if the defense was "generally confirmed," and it feared that such a development would seriously weaken private enforcement of the antitrust laws. 392 U.S. at 493-94. These reasons were intimately related. As one commentator has suggested,

"the Court's emphasis on the problems of proof reflected its concern that the attempt to establish a pass-on would so bog down the litigation process as to undermine the efficacy of the private enforcement mechanism." Comment, Mangano and Ultimate-Consumer Standing: The Misuse of the Hanover Doctrine, 72 Col. L.Rev. 394, 408 (1972).

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A similar reading is suggested by Judge Smith's observation in State of West Virginia v. Chas. Pfizer & Co., supra, 440 F.2d at 1087, that "(i)n considering . . . the obvious reluctance of the Court to allow the passing-on doctrine to be used as a defense to treble-damage liability . . . the most important thing to keep in mind is the result orientation with which the Court has approached the whole area of private treble-damage litigation." Thus, defendants' invocation of Hanover, which rejected a proposed pass-on defense in order to ensure that those who violated the antitrust laws did not escape liability through a multiplication of legal complexity, strikes a discordant note. Cf. Boshes v. General Motors Corp., No. 68 C 1454 (N.D. Ill., May 3, 1973), slip op. at 10-11. The attempt to transform a rejection of a defense because it unduly hampers antitrust enforcement into a reason for a complete refusal to entertain the claims of a certain class of plaintiffs seems an ingenious attempt to turn the decision and its underlying rationale on its head.

The hardware manufacturers are not themselves raising a pass-on defense. They argue that the considerations which led the Supreme Court to reject it in Hanover logically lead to the conclusion that the governmental plaintiffs would face, in the language of Hanover, "nearly insuperable difficulty" in proving their damages. I recognize that several

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courts have adopted this rationale,^{5/} but such a holding, as Judge Decker noted, "(i)n essence . . . reads Hanover Shoe as establishing a general rule of 'privity' for standing to sue in a private antitrust action," Boshes v. General Motors Corp., supra at slip op. 10, which "would be stretching Hanover Shoe beyond all recognition" Id. at slip op. 15. The radical extent of such a stretch is seen when one recalls that Hanover denied a defense which was offered after plaintiffs had put in their proof in a long and complex trial. Here defendants seek to use that decision to shut off plaintiffs' case entirely and prevent them from going to trial at all.

It would be improper, and somewhat illogical, to decide on a pretrial motion for summary judgment that the plaintiffs could not prove their damages.^{6/} Such a determination should await trial. Assuming, as must be done on summary judgment, that these defendants have violated the antitrust

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See the cases cited in Boshes v. General Motors Corp., supra at slip op. 7 n.5. However, several of these cases, e.g., City & County of Denver v. American Oil Co., 53 F.R.D. 620 (D. Colo. 1971), were decided in the context of a class action determination and are thus only of marginal relevance here.

^{6/}

Insuperable problems of class action management might make pretrial dismissal of certain claims appropriate. See Eisen v. Carlisle & Jacquelin, Dkt. No. 72-1521 (2d Cir., May 1, 1973), slip op. 3217. But no class action issue is before the court on this motion.

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laws, they should not be permitted to escape the penalties Congress has mandated. To do so would fly in the face of the Supreme Court's manifest concern for "the effectiveness of the private action as a vital means of enforcing the antitrust policy of the United States." Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 136 (1968). See also, Hanover, 392 U.S. at 493-94, and the analysis of the Supreme Court's attitude in State of West Virginia v. Chas. Pfizer & Co., supra, 440 F.2d at 1087-88.

Defendants' only valid interest is in being free from duplicative recoveries, a consideration given great weight in Hawaii v. Standard Oil Co., supra, 405 U.S. at 264, 266. However, in the present context this possibility is largely ^{7/} illusory. As Judge Decker noted, the statute of limitations may limit the extent of liability to some plaintiffs and if it "does not obviate the possibility of double liability, the doctrine of collateral estoppel probably would." Boshes v. General Motors Corp., supra at slip op. 16. ^{8/} In addition,

^{7/} 15 U.S.C. § 15b provides a limitation period of four years.

^{8/} Judge Decker added an explanatory footnote on the collateral estoppel issue at this point: "For example, a jury finding that an overcharge had been passed-on, particularly by a party in contractual privity with the alleged antitrust violator, would preclude relitigation of the same issue by the 'passing-on' party (e.g. the initial purchaser) who is higher up in the distributive chain. See, Blonder-Tongue Laboratories, Inc. v. University of Illinois, 402 U.S. 313 (1971)."

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just as this case is before the court pursuant to transfer under multidistrict procedures, there exists a similar provision to consolidate for trial all suits growing out of the same claims. See 28 U.S.C. § 1404(a). The defendants might also employ statutory interpleader, 28 U.S.C. § 1335, to protect themselves against subsequent lawsuits. In short, the spectre of multiple recoveries is at this stage " . . . nothing more than . . . a hypothetical question concerning the allocation of provable injury, not that of the standing necessary to maintain a cause of action." State of Washington v. American Pipe & Construction Co., 274 F.Supp. 961, 965 (W.D. Wash. 1967). Existing judicial procedures amply protect defendants' legitimate interests, and it is incumbent upon the lower courts, in light of the Supreme Court's "result orientation" in this area, to move gingerly, if at all, to squelch a plaintiff's case. If the governmental plaintiffs can in fact prove injury,^{9/} the difficulties of apportionment of damages can be managed when the proper time comes. That these difficulties should not be insuperable is suggested by the Pfizer case, supra, where Judge Wyatt was able to superintend a complex damage allotment among

^{9/}

It should be noted that in Mangano, on which defendants so heavily rely, the court viewed the chain of distribution as leading from the manufacturer to wholesaler to plumbing contractor to builder and only then to the plaintiff owners. 50 F.R.D. at 25-26. Here, the plaintiffs are not further removed from the defendants.

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several categories of plaintiffs.^{10/} See also, Comment, supra, 72 Col. L.Rev. at 410-11.

Hanover itself supports the view taken here. In rejecting the pass-on defense, Justice White said:

"In addition, if buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to their customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness." 392 U.S. at 494 (emphasis in original).

This language does not rule out suits by ultimate consumers; if anything, it recognizes the presence of economic realities which are likely to deter the bringing of such actions. The decision itself should not be used to erect a legal barrier to consumers who have managed to bring suit. Moreover, Hanover was decided in the infancy of amended Rule 23, when it may not have been apparent how the ingenuity of the Bar in the use of the Rule's liberalized procedures would facilitate the bringing of class actions; rapid development

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It is true, of course, that the allotment was made when the defendants offered a settlement. However, the determination of the percentage share to be given each class presented many of the same problems defendants claim are insuperable.

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in this area may well have influenced Justice Marshall's approving comments on consumer antitrust class actions in Hawaii v. Standard Oil Co., supra, 405 U.S. at 266. But cf. Eisen v. Carlisle & Jacquelin, supra; Bill Minnielli Cement Contracting, Inc. v. Richter Concrete Corp., 1973 Trade Cases, para. 74,591 (S.D. Ohio W.D., June 29, 1973). Thus, the presence of the ultimate consumers in this court advances rather than obstructs the policies enunciated by the Supreme Court in Hanover when it rejected use there of the passing-on defense.

Finally, there is an important lesson to be learned from the sequel to the dismissal of the suits brought by the ultimate consumers in the plumbing fixtures antitrust litigation. See Mangano, supra, which dismissed the homeowner plaintiffs, and its companion case, Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 323 F.Supp. 381 (E.D. Pa. 1970)(Maricopa County), dismissing the public body plaintiffs. The Third Circuit subsequently affirmed the district court's approval of a settlement with the remaining contractor plaintiffs, some of whom argued that not enough money had been allocated to that class. The court rejected this contention, in part because "the claims of this class were minimized by the probability that overcharges made upon them were passed on to their customers." Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30, 34 (3d

-11-

Cir. 1971). Thus, the defendants in the plumbing fixtures cases managed neatly to have it both ways. They escaped any liability to the ultimate purchasers, and then got off with reduced damages on the theory that the parties who had suffered legally cognizable injury had passed on their losses to those same ultimate purchasers. No result could more effectively undercut the important congressional policy embodied in the Clayton Act, which includes awards of treble damages as its primary weapon of enforcement. Dismissal of the governmental plaintiffs at this stage of the present litigation would provide the stage for the same acrobatics so dextrously performed by the Manzano defendants.

II.

An additional, independent reason also requires denying defendants' motion for summary judgment. In concluding its discussion of the passing-on issue in Hanover, the Court emphasized that it had not totally rejected use of the defense. It stated that it would permit the defense to be raised in certain situations " . . . for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged" 392 U.S. at 494. Thus, even if the foregoing discussion of Hanover and the "standing" of ultimate consumers

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is quite wrong, the governmental plaintiffs could recover if they could show that so-called direct purchasers -- contractors who made the actual purchases of builders' hardware from the defendants -- passed on the overcharges to them through a "cost-plus" or similar arrangement. Defendants do not deny that the governmental plaintiffs could recover if they could prove the existence of such an arrangement; rather they devoted great effort in their brief and at oral argument in attempting to establish that no such practice exists.

In order to prevail on summary judgment, defendants must satisfy the well-established "stringent standard" of Fed.R.Civ.P. 56(c) by demonstrating that no genuine issue of material fact remains to be tried.

"Before summary judgment will be granted it must be clear what the truth is and any doubt as to the existence of a genuine issue of material fact will be resolved against the movant. Because the burden is on the movant, the evidence presented to the court always is construed in favor of the party opposing the motion and he is given the benefit of all favorable inferences that can be drawn from it. Finally, the facts asserted by the party opposing the motion, if supported by affidavits or other evidentiary material, are regarded as true." 10 C.Wright & A.Miller, Federal Practice & Procedure, § 2727 (1973) (citations omitted).

See also, United States v. Diebold, 369 U.S. 654 (1962); cf. Addicks v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). Of

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particular importance is the rule that in the circumstances of this case, the facts asserted in the affidavits submitted by the plaintiffs are to be taken as true.^{11/} Plaintiffs have furnished affidavits from several contractors and two economists. The affidavits of McHugh, Foley, and Sollitt all state that once a bid is received from a builders' hardware distributor, that sum is included as a single line entry on the contractor's own estimates, independent of unit prices or quantity estimates, and, along with his own percentage markup, is included in toto in his bid on a project. The affidavit of Willard F. Mueller, a member of the Faculty of Law at the University of Wisconsin as well as Professor of Economics there, reviewed the contractors' affidavits^{12/} and concluded:

"Based on the preceding, we may infer that any overcharges paid for finished hardware components by general contractors are fully reflected in their bids on buildings for the State of Illinois. Moreover, because the percentage markup applied to costs by general contractors in calculating their bids are unaffected by the price of finished hardware, the full finished hardware overcharge is

^{11/}

This principle is recognized in this circuit. See First National Bk. of Cincinnati v. Pepper, 454 F.2d 626 (2d Cir. 1972).

^{12/}

All of the contractors whose affidavits have been submitted by the plaintiffs are located in Illinois, which apparently explains Professor Mueller's references to the State of Illinois as the ultimate purchaser.

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passed on to the State of Illinois plus the contractor's percentage markup on the overcharge. In other words, if this percentage markup were 10 percent, for each \$1 that the conspiracy increases prices to general contractors, the State of Illinois would pay an extra \$1.10.

"Additionally, because finished hardware components are essential parts of a building and represent a relatively small part of the total costs of a building, the demand for these components is very inelastic, i.e., the volume of purchases are not affected by price. When demand is very inelastic, increases in costs due to an overcharge will be passed on in full.

"Finally, the most convincing evidence in the present case that the general contractor does in fact pass on the full overcharge to the final purchaser is that the general contractors disavow any personal injury from the overcharge. This clearly is a case where the burden of the overcharge is not shared by successive parties in the distribution channel. Rather, the general contractors pass on the full overcharge to the ultimate purchaser, the State of Illinois." Affidavit of William F. Mueller at 4-5.

In light of these affidavits, assumed to be true for present purposes, it is impossible to conclude that there exists no genuine issue of material fact over whether contractors use something like a "cost-plus" arrangement with respect to builders' hardware so that the governmental plaintiffs could readily prove that they, and not the contractors, have suffered the overcharges. To the contrary, it is apparent that a very live factual dispute exists on this question, which can only be resolved at trial. Cf. State of Minnesota v. United States Steel Corp., 438 F.2d 1380, 1382-84 (8th Cir. 1971). It is noteworthy that the court in Mangano, supra,

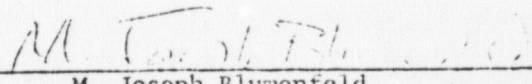
-15-

felt able to dismiss the suit on summary judgment because plaintiff had so blatantly flouted its discovery orders that it invoked the sanctions provided by Rule 37(b)(2)(ii) and presumed the fact "2) That the present plaintiffs did not make their purchases pursuant to a preexisting cost-plus contract or analogous fixed markup type of arrangement." 50 F.R.D. at 19. In its brief affirmance, the court of appeals placed particular emphasis on plaintiffs' inexcusable failure to answer interrogatories to support the dismissal by the district court. 438 F.2d at 1188. There has been no such recalcitrance by the plaintiffs to assist defendants here.

III.

To summarize, I hold that the governmental plaintiffs may properly maintain this action, that difficulties of proof or apportionment of damages are not indubitably insurmountable and should await trial before being resolved. An important issue of fact -- whether a "cost-plus" or analogous fixed markup arrangement exists between contractors and buyers with respect to builders' hardware -- is a matter of great dispute. Therefore, defendants' motion for summary judgment is denied.

Dated at Hartford, Connecticut, this 22nd day of August, 1973.


M. Joseph Blumenfeld
Chief Judge

FILED

JUL 20 9 44 AM '73

CLERK
U.S. DISTRICT COURT
HARTFORD, CONN.UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

IN RE:

M.D.L. DOCKET NO. 45

MASTER KEY ANTITRUST LITIGATION

ALL CASES

RULING ON MOTION TO AMEND ORDER

The defendants move that the court amend its ruling of August 23, 1973 denying the defendants' Motion for Summary Judgment by certifying that it is appealable pursuant to 28 U.S.C. § 1292(b).

That ruling was based on the ground that there are genuine issues of fact relating to the "pass on" defense asserted by the defendants. This did not involve any controlling question of law as to which there is substantial ground for difference of opinion. See Missouri v. Stupp Bros. Bridge & Iron Co., 249 F.Supp. 111 (W.D. Mo. 1966) where Judge Oliver refused to certify such a ruling made by him in a case presenting the same issues on similar facts (248 F.Supp. 169 (1965)).

The motion for certification is denied.

Dated at Hartford, Connecticut, this 19th day of September, 1973.

M. Joseph Blumenfeld
M. Joseph Blumenfeld
Chief Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

IN RE: : M.D.L. DOCKET NO. 45
MASTER KEY ANTITRUST LITIGATION : ALL CASES

ANSWERS OF PLAINTIFF CITY OF
PHILADELPHIA TO DEFENDANTS INTERROGATORIES

David Berger
H. Laddie Montague, Jr.
Paul J. McMahon
1622 Locust Street
Philadelphia, PA 19103
(215) 732-8000

INTERROGATORIES

1. State whether you are:

(a) A corporation (other than a governmental agency)

and, if so, state:

(i) The state and date of incorporation;

(ii) The address of your principal place of business and of each other location at which you now transact or have transacted business;

(iv) The identification of each of your directors, officers and managing agents;

(b) A partnership and, if so, state:

(i) The date when and the place where the partnership was formed;

(ii) The address of your principal place of business and of each other location at which you now transact or have transacted business;

(c) A state or municipal governmental body, governmental agency, authority, subdivision or other governmental unit and, if so, state:

(i) The type of governmental body, agency, authority, subdivision or unit;

1. (continued)

(iv) A description of each of your functions insofar as they relate to the purchase of builders hardware;

(v) The extent of your jurisdiction (e.g., state-wide, county-wide, etc.);

ANSWER

1c(i) City

(iv) Construction of public buildings.

(v) Citywide

2. (a) Identify each of your departments, divisions, bureaus, offices or other unit or subdivision which now has or has had responsibility for the purchase of builders hardware;

Answer

2(a) Public Property Department

3. State whether, during the period covered by these Interrogatories, you purchased builders hardware directly from any defendant, and if your answer is in the affirmative, state:

(a) The year and the quarter in which such purchase was made;

(b) The identity of the defendant from whom you purchased;

(c) The purchase order number, file number, and any other number or symbol assigned to identify the purchase or contract to purchase;

(d) The identification of the items of builders hardware purchased.

Answer

3. No.

4. State whether, during the period covered by these Interrogatories, you purchased builders hardware from any other supplier, and if your answer is in the affirmative, state as to each purchase:

(a) The year and quarter in which each such purchase was made;

(b) The identity of the supplier from whom you purchased;

(c) The identification of the items of builders hardware purchased;

(i) The manner in which the supplier was selected, whether by sealed bids, quotations, negotiation, or however;

Answer

4. Yes. See Exhibit "A" for date of contract, identity of contractor and manufacturer. The contractor was selected by sealed bids. The identification of the many items of builders hardware purchased by the City of Philadelphia is contained in contracts in the possession of Robert Belfi, Chief Engineer of the Public Property Department.

5. State whether, during the period covered by these Interrogatories, you purchased builders hardware from a person other than those identified in your answers to Interrogatories 3 and 4, and if your answer is in the affirmative, provide as to each purchase the same information as is requested in Interrogatory 4(a) through 4(j), inclusive.

ANSWER

5. Not applicable.

6. If, during the period covered by these Interrogatories, you purchased builders hardware from a defendant, or any other supplier or person, state as to each purchase:

(a) Whether you had a contract with the seller (if a supplier or other person) which fixed the price pursuant to a pre-existing cost-plus or fixed markup arrangement, and if so, state the terms of such agreement, and also state:

(i) The seller thereof and the date of sale;

(b) Whether you resold the builders hardware, and if so, state:

(i) The purchaser thereof and the date of sale;

(ii) The purchase price paid therefor, and

(iii) Whether you had a contract with the buyer which fixed the price pursuant to a pre-existing cost-plus or fixed markup arrangement, and if so, state the terms of such agreement.

(c) Whether you installed the builders hardware on any building, project or other facility (each of which is generally referred to hereafter as a "structure"), and if so, state:

(i) The name and location of the structure, the identity of the owner of the structure, and the date of installation;

(ii) Your relationship to the owner of the structure or land on which the structure was constructed (e.g., general contractor);

(iii) The manner in which you were selected to install such builders hardware, whether by sealed bids, quotations, negotiation, or however;

6. (iv) The total price actually paid to you for the installation of such builders hardware, including and specifying any adjustments or changes in price and any credits, rebates or deposit returns, whether or not made at the time of the initial payment;

(v) The number of individual items of each type of builders hardware (e.g., 200 locksets), specifying where available the total price actually paid for each type of builders hardware and the unit prices actually paid for each such type;

(vi) Whether you had a contract with the purchaser which fixed the price paid to you pursuant to a pre-existing cost-plus or fixed mark-up arrangement, and if so, state the terms of such agreement; and

(vii) Whether such price for installation of builders hardware was stated separately from the total price you charged the purchaser for all goods and services supplied by you, and if the answer is in the negative, state the total price you charged the purchaser for all goods and services supplied by you and describe the nature of such goods and services.

ANSWER

6. (a) To our knowledge the contractors include the full cost of builders hardware in the contract price and therefore such costs are paid by the City of Philadelphia.
- (b) No
- (c) See Exhibit "A" - The City of Philadelphia contracted for the construction of buildings containing builders hardware.

7. Identify by name and location each structure owned by you at the present time or at any time for which these Interrogatories apply in which a masterkey system was installed, and with respect thereto state:

(a) Whether the structure constituted or included:

- (i) Dwelling houses;
- (ii) Apartment buildings;
- (iii) Office buildings;
- (iv) School buildings;
- (v) Other buildings or structures of any kind,

specifying the kind of structure;

(b) The brand name or brand names of the master key system or component parts thereof installed in the structure;

(i) The person who purchased or contracted for the purchase of the master key system or component parts thereof, and the door closers and fire exit bolts thereof, and the relationship of such person to you.

Answer

7. See Exhibit "A" for a description of buildings constructed, the brand name of master key systems and the name of contractor who built such buildings.

8. If you identified any structure in answer to Interrogatory 7 and you had acquired the finished structure (as distinguished from having constructed or caused the structure to be constructed), state as to each such structure:

(a) The date of acquisition and the seller or other transferor thereof;

(b) The purchase price thereof;

(c) Whether you had a contract with the seller which fixed the price paid by you pursuant to a pre-existing cost-plus or fixed markup arrangement, and if so, state the terms of such agreement;

(d) Whether the purchase price was broken down so as to set forth separately the price of the master key system or any component part thereof or any of the hardware installed on or in connection with the doors in the structure;

(f) Whether the purchase price of the structure was determined by public bidding.

Answer

8. N/A

9. If you identified any structure in answer to Interrogatory 7 and you had constructed or caused the structure to be constructed, state as to each such structure:

(a) The name and address of the general contractor for the structure and the date on which construction was completed;

(b) The total cost of the structure to you;

(c) Whether you had a contract with the seller which fixed the price paid by you pursuant to a pre-existing cost-plus or fixed markup arrangement, and if so, state the terms of such agreement;

(d) Whether the cost was broken down so as to set forth separately the price of the master key system or any component part thereof or any of the hardware installed on or in connection with the doors in the structure;

(f) Whether the contract price of the structure was determined by public bidding.

ANSWER

9. (a) See Exhibit "A"
(b) See Exhibit "A"
(c) See answer to Interrogatory 6(a)
(d) No
(f) Yes

11. If you sold, or otherwise transferred ownership to, any structure identified in you answer to Interrogatory 7, state as to each such structure:

(a) The manner of disposition of the structure, the person who acquired the structure, and the date of disposition;

(b) The total sales price of the structure;

(c) Whether you had a contract with the purchaser which fixed the price paid to you pursuant to a pre-existing cost-plus or fixed markup arrangement, and if so, state the terms of such agreement;

(d) Whether the price was broken down so as to set forth separately the price of the master key system or any component part thereof or of any of the hardware installed on or in connection with the doors in the structure;

(f) Whether the sales price of the structure was determined by public bidding.

Answer

11. N/A

13. Identify the documents from which the following information can be obtained:

(a) The date when you purchased master key systems or any component part thereof and the price paid therefor;

(b) The date when you purchased items of builders hardware other than master key systems and the price paid therefor; and

(c) The date when you entered into any agreement for the purchase or construction of a structure on which was installed a master key system or any component part thereof, the price paid for such purchase or construction, and the manner in which the price paid for such purchase or construction was determined.

Answer

13. This information is contained in contracts in the custody of Robert Belfi, Chief Engineer of the Department of Public Property. These contracts were signed by the Director of Public Property. All other available information, including project numbers, is contained in Exhibit "A".

A F F I D A V I T

Joseph R. Lally, being first duly sworn according to law, deposes and says that he is authorized to submit Answers to the foregoing Interrogatories, that the foregoing Answers were prepared under his direction, and that the foregoing Answers are true and correct to the best of his knowledge, or information and belief.

Joseph R. Lally

Sworn to and Subscribed:
before me this 5th day:

of April, 1973.

Robert T. Carter

NOTARY PUBLIC

Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires July 28, 1975

PROJECT	DESCRIPTION & LOCATION	MASTER KEY MANUFACTURER	GENERAL CONTRACTOR	TOTAL COST OF PROJECT	WORK STARTED	WORK COMPLETED
13-092-1-1	Fire Station 711 S. Broad	Corbin	R.M. Shoemaker	279,938	3-15-64	2-11-65
13-093-1-1	Fire Station Frankford & Linden	Corbin	Eric Ericson 404 W. Cheltenham	277,264	8-12-65	6-15-66
13-094-1-1	Fire Station 4th & Arch	Corbin	Eric Ericson 404 W. Cheltenham	347,076	8-13-67	1-23-69
13-095-1-1	Fire Station Boudinot & Hart	Armalite	Eric Ericson 404 W. Cheltenham	264,363	3-13-67	8-21-68
13-096-1-1	Fire Station Belmont & Viloa	Kawneer	Eric Ericson 404 W. Cheltenham	313,771	9-9-68	9-23-71
13-098-1-1	Fire Station 4th & Girard	Yale	The Mcshor Corp. 478 Bethlehem Pike Flourtown, Pa.	390,891	3-25-71	1-5-73
13-009-1-1	Fire Station Germantown & Carpenter	Russwin	Eric Ericson 404 W. Cheltenham	156,018	10-4-62	1-6-64
14-013-1-1	Health Center Broad & Morris	Sargent	P. Agnes 2213 S. Broad	703,150	8-6-62	9-19-63
14-015-1-2	Health Center 44th & Overford	Russwin	Perry Goldman Const. Lewis Tower Bldg. 225 S. 15th St.	650,240	7-19-65	5-16-66
14-016-1-1	New Lab Bldg. Lycoming & Castor	Schlage	Wm. Sterling Co. 26th & South Sts.	398,011		
14-017-1-1	Office For Medical Examiner, Civic Center Blvd.	Corbin	Van Cor Inc. Pa. Turnpike & Gravers Lane Plymouth Meeting, Pa	3,507,719	10-10-68	unfinsished
14-019-1-1	Neighborhood Health & Science Center	General	I. Lazar & Sons 11 Sayer Ave. Cherry Hill, NJ	754,068	3-21-71	3-7-73
15-001-1-24	Student Nurses Dorm - P.G.H.	Corbin	McCloskey & Co. 1620 W. Thompson	4,041,467	7-24-64	11-1-66

EXHIBIT "A"

PROJECT #	DESCRIPTION & LOCATION	MASTER KEY MANUFACTURER	GENERAL CONTRACTOR	TOTAL COST OF PROJECT	WORK STARTED	WORK COMPLETED
11-021-1-1	Police Administration Bldg. 7th & Race Sts.	Yale	Sovereign Constriction Ltd. Fort Lee, Va.	4,759,894	7-8-60	4-20-67
11-023-1-1	Police Station, Front & Westmoreland	Yale	P. Agness 2213 S. Broad Phila., Pa	557,534	7-11-60	6-11-62
11-061-1-1	Police Station, York & Ro & Champlost	Sargent	MacKenzie Nimmer 4633 N. Front Phila., Pa	1,249,910	9-21-69	12-8-72
13-010-1-5	Fire Station, 12th & Reed	Kawneer	MacKenzie Nimmer 4633 N. Front Phila., Pa	260,358	2-1-63	2-10-65
13-013-1-1	Fire Station, 16th & Parrish	Sesame	Kenny Constriction 4333 Leiper St.	119,574	8-24-68	4-21-70
13-022-1-1	Fire Station, Front & Luzerne Sts.	Corbin	Wm. Linker Co. 2036 Arch Phila., Pa	410,779	3-5-62	5-3-63
13-033-1-1	Fire Station, Richmond & Kirkbride Sts.	Kawneer	P. Agnes 2213 S. Broad St. Phila., Pa	206,072	3-16-64	12-16-65
13-036-1-1	Fire Station, 7618 Frankford	Sargent	Perry J. Goldman Lewis Tower Bldg. 225 S. 15th St. Phila., Pa	373,099	3-25-71	1-9-73
13-043-1-1	Fire Station, 2110 Market St.	Corbin	Seaboard Surety Co. 100 William St. New York, NY	319,444	3-15-63	3-30-64
13-045-1-1	Fire Station, 26th & York	Crouse-Heinds	Wm. Sterling 26th & South Phila., PA	237,260	7-27-61	11-8-62
13-076-1-1	Fire Station, Academy Rd. & Comly St.	Allan Bradley	Seaboard Surety Co. 100 William St. New York, NY	250,074	7-7-63	8-27-65

EXHIBIT "A"

PROJECT	DESCRIPTION & LOCATION	MASTER KEY MANUFACTURER	GENERAL CONTRACTOR	TOTAL COST OF PROJECT	WORK STARTED	WORK COMPLETED
15-001-1-58	New Laundry & Linen, 58th & Lindbergh	Corbin	Van Cor Inc Pa. Turnpike & Gravers Lane Plymouth Meeting, PA	1,566,278	6-20-68	1-30-73
15-001-1-85	Nurses Bldg. 34th & Civic Center Blvd.	Corbin	Somers Constr. Union & Cynwyd Bala Cynwyd, Pa	6,179,047	2-20-70	unfinished
22-003-1-2	Infirmiry-Riverview Hospital	Corbin-Schlage Russwin-Sargent	Stone Contruction 1717 Brandywine	360,175	6-6-60	3-14-62
22-003-1-21	Riverview-Women's Cottages	Sargent	Somers Const. Union & Cynwyd Bala Cynwyd, PA	1,478,418	8-6-67	12-29-69
22-003-1-27	Riverview Modernization	Corbin	Robert A. Gianni 541 E. Indiana	973,283	8-30-69	10-21-71
22-008-1-1	House of Detention	Yale-Corbin Sargent & Russwin	John McShain 17th & Spring Garden	6,335,726	10-27-61	5-18-67
43-002-1-29	Modernization of Convention Center	Corbin	Somers Const. Union & Cynwyd Bala Cynwyd, Pa	1,364,672	2-14-63	3-15-65
43-002-1-30	Exhibit Hall Parking, Civic Center	Corbin	McCloskey & Co. 1620 W. Thompson	15,432,952	6-13-65	10-10-68
43-002-1-72	Maintenance Shop Civic Center	Corbin 6127 Cedar Ave.	L. Reese & Sons	128,522	8-24-68	6-11-69
52-012-1-1	Greater Olney Library	Russwin	James A. Mann 2927 Guilford	230,703	7-25-63	1-8-65
52-026-1-1	Ritner Library	Corbin	Schaefer & Co. 60 W. Mt. Carner Glenside, Pa	154,137	8-1-69	12-3-70
52-039-1-1	Columbia Ave. Branch Library	Schlage	P. Agnes 2213 S. Broad	242,398	2-27-61	1-11-62
52-040-1-1	Lawncrest Branch Library	Taylor-Schlage	P. Agnes 2213 S. Broad	256,740	8-22-60	9-11-61

EXHIBIT "A"

PROJECT	DESCRIPTION & LOCATION	MASTER KEY MANUFACTURER	GENERAL CONTRACTOR	TOTAL COST OF PROJECT	WORK STARTED	WORK COMPLETED
52-043-1-1	Northeast Reg. Library	Russwin-Corbin	B. Bornstein & Sons 2027 Arch St.	1,041,174	8-9-62	4-8-64
52-043-1-1	Wynnefield Br. Library	Schlage	J.S. Cornell & Sons 1528 Cherry St.	401,278	3-1-63	9-24-64
52-044-1-1	Girard Ave. Br. Library	Lockwood	P. Agnes Co. 2213 S. Broad	390,503	11-5-67	9-15-68
52-045-1-1	Broad & Morris Br. Library	Corbin	Seaboard Surety Co. 100 William St. NY, NY	333,304	12-30-63	1-3-66
52-046-1-1	Roxborough Library	LCO Sargent	Frank Const. 1401 Bethlehem Flourtown, Pa	435,217	3-1-68	9-9-70
52-047-1-1	Bustleton Br. Library	Corbin	N.h. Martin Co. 1021 Essey Narbeth, Pa	318,715	9-28-64	1-12-66
52-049-1-1	Welsh Rd. Br. Library N.E. Shopping Center	Welsh	Eric Ericson 404 W. Cheltne	404,688	8-21-67	2-11-71
52-050-1-1	Fox Chase Br. Library Rhawn & Jeanes STs.	Yale	R. Ranieri 1 Maple Ave. Hatboro, Pa	403,377	5-26-67	7-24-69
52-052-1-1	Branch Library Knights & Fairdale	ILCO	Eric Ericson 404 W. Cheltenham	426,957	7-11-68	12-23-70
52-053-1-1	Torresdale Br. Library Holme & Willits	Sargent ILCO	MacKenzie-Nimmer 4633 N. Front St.	457,934	5,28,70	8-15-72
52-054-1-1	Overbrook Park Br. Library	Corbin	Paul Vagnoni 221 Davisville Willow Grove, Pa.	593,640	10-22-70	unfinished
52-037-1-1	Alterations to Nicetown Br. Library	ILCO Yale	Wm. Linker 2036 Arch	141,240	2-1-60	12-7-60
52-041-1-1	Southwark Br. Library	ILCO	Wm. Sterling 26th & South St	311,654	9-24-62	3-25-64
22-005-1-5	Warehouse Holmesburg	Corbin EXHIBIT "A"	Radomski * Sons	325,536	5-12-61	4-23-62

PROJECT	DESCRIPTION & LOCATION	MASTER KEY MANUFACTURER	GENERAL CONTRACTOR	TOTAL COST OF PROJECT	WORK STARTED	WORK COMPLETED
20-020-1-	Municipal Services Bldg.	Yale	John McShain	18,448,269	11-3-62	6-3-69

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

IN RE :
MASTER KEY ANTITRUST LITIGATION : M.D.L. DOCKET NO. 45

CITY OF PHILADELPHIA, et al :
v. : C.A. NO. 70-352
EMHART CORPORATION, et al :

SUPPLEMENTAL ANSWERS OF PLAINTIFF CITY OF PHILADELPHIA
TO DEFENDANTS' FIRST SET OF CONSOLIDATED INTERROGATORIES

5. State whether, during the period covered by these Interrogatories, you purchased builders hardware from a person other than those identified in your answers to Interrogatories 3 and 4, and if your answer is in the affirmative, provide as to each purchase the same information as is requested in Interrogatory 4(a) through 4(j), inclusive.

ANSWER

5. No.

10. If you identified any structure in answer to Interrogatory 7 and you have not referred to it in answers to Interrogatories 8 and 9, state as to each such structure:

(a) The manner in which you acquired the structure, the person from whom it was acquired, and the date of acquisition;

(b) The total cost of the structure to you;

(c) Whether you had a contract with the seller which fixed the price paid by you pursuant to a pre-existing cost-plus or fixed markup arrangement, and if so, state the terms of such agreement;

(d) Whether the cost was broken down so as to set forth separately the price of the master key system or any component part thereof or any of the hardware installed on or in connection with the doors in the structure;

(e) If your answer to (d) above is in the affirmative, state:

(i) The price of the master key system and/or any component part thereof; and

(ii) The price of the hardware installed on or in connection with the doors in this structure; and

(f) Whether the purchase price of the structure was determined by public bidding.

ANSWER

10. Not applicable.

14. For each year or portion thereof from 1 January 1950 to the date upon which you file your answers to these Interrogatories, state your policy with respect to the retention of documents, including business records, and identify any document which sets forth such policy or change in such policy.

ANSWER

14. The policy with respect to the retention of documents is identified in the provisions of the Home Rule Charter, Section 8-211. Pursuant to that policy, no documents identified in Exhibit A of Plaintiff City of Philadelphia's Answers to Defendants' First Set of Consolidated Interrogatories have been destroyed.

15. If any document whose identification or description is called for in any of the foregoing Interrogatories 1 through 14, inclusive, was once in your possession or subject to your control but is no longer, state as to each such document:

(a) The description of the document and which of the foregoing Interrogatories calls for its identification or description;

(b) What disposition was made of the document;

(c) The person who was last known to have the document in his possession or subject to his control; and

(d) The name, last known address, and every position held by each person you have reason to believe had knowledge of its contents or received a copy of such document.

ANSWER

15. Answer to this Interrogatory can not be ascertained at this time. However, it is believed that no documents in response to this interrogatory have been destroyed.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

IN RE: : M.D.L. DOCKET NO. 45
MASTER KEY ANTITRUST LITIGATION : ALL CASES

ANSWERS OF PLAINTIFF, AMHERST LEASING CORP.
TO DEFENDANTS' INTERROGATORIES

David Berger
H. Laddie Montague, Jr.
Paul J. McMahon
1622 Locust Street
Philadelphia, PA 19103

INTERROGATORIES

1. State whether you are:

(a) A corporation (other than a governmental agency) and, if so, state:

(i) The state and date of incorporation;

(ii) The address of your principal place of business and of each other location at which you now transact or have transacted business;

(iv) The identification of each of your directors, officers and managing agents;

(b) A partnership and, if so, state:

(i) The date when and the place where the partnership was formed;

(ii) The address of your principal place of business and of each other location at which you now transact or have transacted business;

(c) A state or municipal governmental body, governmental agency, authority, subdivision or other governmental unit and, if so, state:

(i) The type of governmental body, agency, authority, subdivision or unit;

1. (continued)

(iv) A description of each of your functions insofar as they relate to the purchase of builders hardware;

(v) The extent of your jurisdiction (e.g., state-wide, county-wide, etc.);

ANSWER

1. (a) Amherst Leasing Corp.

(i) 2/16/59

(ii) 97-77 Queens Blvd., Rego Park, N.Y. 11374

(iv) Officers - Samuel J. Lefrak - President
Arthur Phelan - Vice President
Jerry Richter - Secretary

Directors - Samuel J. Lefrak and Arthur Phelan

Managing Agent - Lefrak Management Company

2. (a) Identify each of your departments, divisions, bureaus, offices or other unit or subdivision which now has or has had responsibility for the purchase of builders hardware;

ANSWER

2. (a) Anthony Scavo, Vice President, Construction

3. State whether, during the period covered by these Interrogatories, you purchased builders hardware directly from any defendant, and if your answer is in the affirmative, state:

(a) The year and the quarter in which such purchase was made;

(b) The identity of the defendant from whom you purchased;

(c) The purchase order number, file number, and any other number or symbol assigned to identify the purchase or contract to purchase;

(d) The identification of the items of builders hardware purchased.

ANSWER

3. Not applicable

4. State whether, during the period covered by these Interrogatories, you purchased builders hardware from any other supplier, and if your answer is in the affirmative, state as to each purchase:

(a) The year and quarter in which each such purchase was made;

(b) The identity of the supplier from whom you purchased;

(c) The identification of the items of builders hardware purchased;

(i) The manner in which the supplier was selected, whether by sealed bids, quotations, negotiation, or however;

ANSWER

4. (a) October, 1960

(b) Atlantic Hardware and Supply Corp., 95-97 Van Dam Street, Long Island City, NY.

(c) We will produce contracts and invoices containing the exact information pursuant to Rule 33C. In general we purchased a broad spectrum of building hardware.

(i) By Negotiation.

5. State whether, during the period covered by these Interrogatories, you purchased builders hardware from a person other than those identified in your answers to Interrogatories 3 and 4, and if your answer is in the affirmative, provide as to each purchase the same information as is requested in Interrogatory 4(a) through 4(j), inclusive.

ANSWER

5. Not applicable

6. If, during the period covered by these Interrogatories, you purchased builders hardware from a defendant, or any other supplier or person, state as to each purchase:

(a) Whether you had a contract with the seller (if a supplier or other person) which fixed the price pursuant to a pre-existing cost-plus or fixed markup arrangement, and if so, state the terms of such agreement, and also state:

(i) The seller thereof and the date of sale;

(b) Whether you resold the builders hardware, and if so, state:

(i) The purchaser thereof and the date of sale;

(ii) The purchase price paid therefor, and

(iii) Whether you had a contract with the buyer which fixed the price pursuant to a pre-existing cost-plus or fixed markup arrangement, and if so, state the terms of such agreement.

(c) Whether you installed the builders hardware on any building, project or other facility (each of which is generally referred to hereafter as a "structure"), and if so, state:

(i) The name and location of the structure, the identity of the owner of the structure, and the date of installation;

(ii) Your relationship to the owner of the structure or land on which the structure was constructed (e.g., general contractor);

(iii) The manner in which you were selected to install such builders hardware, whether by sealed bids, quotations, negotiation, or however;

6. (iv) The total price actually paid to you for the installation of such builders hardware, including and specifying any adjustments or changes in price and any credits, rebates or deposit returns, whether or not made at the time of the initial payment;

(v) The number of individual items of each type of builders hardware (e.g., 200 locksets), specifying where available the total price actually paid for each type of builders hardware and the unit prices actually paid for each such type;

(vi) Whether you had a contract with the purchaser which fixed the price paid to you pursuant to a pre-existing cost-plus or fixed markup arrangement, and if so, state the terms of such agreement; and

(vii) Whether such price for installation of builders hardware was stated separately from the total price you charged the purchaser for all goods and services supplied by you, and if the answer is in the negative, state the total price you charged the purchaser for all goods and services supplied by you and describe the nature of such goods and services.

ANSWER

6. (a) We construct our own buildings and we purchase builders-hardware directly from suppliers. The contracts for the sale of builders-hardware are not specifically cost-plus. Our supplier is identified in our answer to Interrogatory 4(b) and further information sought by this interrogatory is contained in contracts which will be produced pursuant to Rule 33(c) of the Federal Rules of Civil Procedure.

6. (b) Not Applicable

6(c)(i) Amherst Leasing Corp., 845 43 St., Bklyn., October 1960

(ii) Builder-Owner

(iii) Not applicable - We are the Builder-Owner

(iv) Not applicable. We purchased hardware directly from the supplier and we installed it ourselves. The exact cost is contained in documents on file at our principal place of business which will be produced pursuant to Rule 33 (c) of the Federal Rules of Civil Procedure.

(v) See 6 (iv)

(vi) Not specifically cost-plus

(vii) Not applicable

7. Identify by name and location each structure owned by you at the present time or at any time for which these Interrogatories apply in which a master key system was installed, and with respect thereto state:

(a) Whether the structure constituted or included:

- (i) Dwelling houses;
- (ii) Apartment buildings;
- (iii) Office buildings;
- (iv) School buildings;
- (v) Other buildings or structures of any kind,

specifying the kind of structure;

(b) The brand name or brand names of the master key system or component parts thereof installed in the structure;

(i) The person who purchased or contracted for the purchase of the master key system or component parts thereof, and the door closers and fire exit bolts thereof, and the relationship of such person to you.

ANSWER

7. (a)(ii) Apartment buildings

(b) Lockwood Locks, a division of Ilco Locks

(i) Anthony Scavo - Vice President - Construction

8. If you identified any structure in answer to Interrogatory 7 and you had acquired the finished structure (as distinguished from having constructed or caused the structure to be constructed), state as to each such structure:

(a) The date of acquisition and the seller or other transferor thereof;

(b) The purchase price thereof;

(c) Whether you had a contract with the seller which fixed the price paid by you pursuant to a pre-existing cost-plus or fixed markup arrangement, and if so, state the terms of such agreement;

(d) Whether the purchase price was broken down so as to set forth separately the price of the master key system or any component part thereof or any of the hardware installed on or in connection with the doors in the structure;

(f) Whether the purchase price of the structure was determined by public bidding.

ANSWER

8. Not applicable

9. If you identified any structure in answer to Interrogatory 7 and you had constructed or caused the structure to be constructed, state as to each such structure:
- (a) The name and address of the general contractor for the structure and the date on which construction was completed;
 - (b) The total cost of the structure to you;
 - (c) Whether you had a contract with the seller which fixed the price paid by you pursuant to a pre-existing cost-plus or fixed markup arrangement, and if so, state the terms of such agreement;
 - (d) Whether the cost was broken down so as to set forth separately the price of the master key system or any component part thereof or any of the hardware installed on or in connection with the doors in the structure;
 - (f) Whether the contract price of the structure was determined by public bidding.

ANSWER

9. We are the builder-owner. Our address is 97-77 Queens Blvd., Rego Park, New York 11374. We purchase directly from the supplier. The information sought by the remaining sub-parts of this interrogatory is contained in contracts and invoices which will be produced pursuant to Rule 33 (c) of the Federal Rules of Civil Procedure.

11. If you sold, or otherwise transferred ownership to, any structure identified in you answer to Interrogatory 7, state as to each such structure:

(a) The manner of disposition of the structure, the person who acquired the structure, and the date of disposition;

(b) The total sales price of the structure;

(c) Whether you had a contract with the purchaser which fixed the price paid to you pursuant to a pre-existing cost-plus or fixed markup arrangement, and if so, state the terms of such agreement;

(d) Whether the price was broken down so as to set forth separately the price of the master key system or any component part thereof or of any of the hardware installed on or in connection with the doors in the structure;

(f) Whether the sales price of the structure was determined by public bidding.

ANSWER

11. Not applicable

13. Identify the documents from which the following information can be obtained:

(a) The date when you purchased master key systems or any component part thereof and the price paid therefor;

(b) The date when you purchased items of builders hardware other than master key systems and the price paid therefor; and

(c) The date when you entered into any agreement for the purchase or construction of a structure on which was installed a master key system or any component part thereof, the price paid for such purchase or construction, and the manner in which the price paid for such purchase or construction was determined.

ANSWER

13. Vendors invoices, which set forth invoice date, invoice number, and total price of the contract which are on file at our principal place of business and will be produced pursuant to Rule 33 (c) of the Federal Rules of Civil Procedure.

A F F I D A V I T

Arthur J. Phelan, being first duly sworn according to law, deposes and says that he is authorized to submit Answers to the foregoing Interrogatories, that the foregoing Answers were prepared under his direction, and that the foregoing Answers are true and correct to the best of his knowledge, or information and belief.

Arthur J. Phelan
Arthur J. Phelan

Sworn to and Subscribed:

before me this 9th day:

of April, 1973.

Paula Bloom
 NOTARY PUBLIC

PAULA BLOOM
 NOTARY PUBLIC, State of New York
 No. 41-8891355
 Qualified in Queens County
 Commission Expires March 30, 1974

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

IN RE:	:	M.D.L. DOCKET NO. 45
	:	
MASTER KEY ANTITRUST LITIGATION	:	ALL CASES
	:	
	:	JANUARY 3, 1975

MEMORANDUM OF DEFENDANTS SARGENT & COMPANY
AND EMHART CORPORATION CONCERNING
PROCEDURES FOR TRIAL

It has already been demonstrated that plaintiffs' proposal for a separate trial of all cases on liability issues alone would not expedite this litigation and would eliminate a key element of proof of liability required of plaintiffs, namely, the fact of injury directly traceable to the alleged violation.* Plaintiffs' proposal would also deny defendants' right to a trial of the liability and damage issues by the same jury. It has also been shown that serious questions exist with respect to class action certification of all of the proposed class actions in this litigation and that class action certification of the proposed national classes should clearly be denied.**

* See Defendants' Memorandum in Opposition to Plaintiffs' Rule 42 Motion.

** See Defendants' Memorandum in Support of Their Motion for Denial of Class Certification.

Defendants recognize the need to develop a procedure for trial of these cases which will minimize the burdens imposed upon the Court and parties, while insuring compliance with substantive and procedural standards. Toward this end, defendants propose that a single state action be tried to conclusion on all issues--liability, impact and damages. For this purpose, defendants would be willing to stipulate that the case proceed as a class action by the representative state. The result in the case would, therefore, be binding upon all members of the class as well as all defendants. The single state action selected for trial should be one of the three cases currently before this Court for all purposes, namely, the actions brought by the States of Connecticut, Indiana, and Pennsylvania.* The other state actions could be tentatively certified and notice required.

Trial of a single state action provides the Court with the most manageable vehicle for disposition of these cases. Selection of one of such state cases for trial will permit more orderly discovery and a more manageable trial. The parties will better be able to focus their discovery on the liability issues raised by plaintiffs' contention proof and the transactions alleged by the state in question to have been the subject of defendants' alleged restrictive practices. At the trial

* Selection of a case before the Court for all purposes would alleviate or obviate further problems regarding transfer and/or consolidation. It would not be proper, in our view, to try more than one of such cases together because the requirements of Rule 42(a) for consolidation would not appear to be met.

the issues of the relevancy of plaintiffs' proof will be sharpened by its necessary relationship to the claims of a single plaintiff.

Moreover, the result in the single state action would largely - if not entirely - determine the disposition of the remaining cases. The trial of one case would inevitably assist in the dispositions of all cases through application of the principles of collateral estoppel and stare decisis. More than that, as a very practical matter the result in the single case would dispose the parties to discuss resolution of the remaining cases.

This proposal has several additional advantages to recommend it. First, the trial of all issues in one case will avoid duplication of effort by eliminating the need for transactional analysis as to both violation and impact on the one hand, and the amount of damages on the other, a fault inherent in plaintiffs' proposals for split trials. Secondly, the trial of one case on all issues guarantees that the substantive standards of proof established by the antitrust laws will be satisfied. Third, determination of both liability and damages will be made by the same jury. And fourth, by postponing final action on the class issues, the Court can, through the trial of the statewide class action, become better informed with regard to the problems of manageability and commonality and thereby make a more enlightened decision with regard to the final certification of additional class actions, should such decision be necessary.

The Relief Requested

For the reasons set forth herein and in Defendants' Memorandum in Opposition to Plaintiffs' Rule 42 Motion and Defendants' Memorandum in Support of their Motion for Denial of Class Certification, the Court should now:

- a) Deny class certification for each action brought as a class action, or, in the alternative, deny certification of the proposed national class actions and tentatively certify and require notice with respect to the proposed state class actions.
- b) Deny plaintiffs' motion for separation of liability and damage issues.
- c) Schedule a pretrial hearing in those cases before the Court for all purposes (Connecticut, Indiana and Pennsylvania) to consider steps necessary to complete discovery and prepare one of those cases for trial as a state class action on all issues.

Respectfully submitted,

SARGENT & COMPANY
EMHART CORPORATION

By _____
of Richard M. Reynolds
Day, Berry & Howard
One Constitution Plaza
Hartford, Connecticut 06103

Dated: January 3, 1975.

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I, Richard M. Reynolds, do hereby certify that I have on this day mailed, postage prepaid, a copy of the above memorandum to counsel on the attached service list of counsel, pursuant to Rule 6 of the Rules of Procedure of this Court.

of Richard M. Reynolds
Day, Berry & Howard
One Constitution Plaza
Hartford, Connecticut 06103

Dated: January 3, 1975

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

IN RE:

MASTER KEY ANTITRUST LITIGATION

M.D.L. DOCKET NO. 45

ALL CASES

SEPARATE CLASS ACTION AND TRIAL PROPOSAL
OF DEFENDANTS EATON CORPORATION AND ILCO CORPORATION

For the reasons hereinafter stated, defendants Eaton Corporation and Ilco Corporation submit the following class action and trial proposal:

(1) That the Court disallow all nationwide class actions for the reasons set forth in Defendants' Memorandum in Support of their Motion for Denial of Class Certification, which Eaton and Ilco specifically join in and adopt:

(2) That the Court disallow all statewide class actions as to the issue of the alleged conspiracy among the defendant manufacturers to impose vertical restrictions on their distributors, in accordance with Rule 23(c)(4)(A) and for reasons hereinafter set forth;

(3) That the Court certify the fourteen statewide class actions on the sole issue of the alleged horizontal conspiracy among defendant manufacturers to fix book prices, in accordance with Rule 23(c)(4)(A) and for the reasons hereinafter set forth;

(4) That the Court conduct a single trial of all issues - violation, impact and damage - relating to the alleged horizontal conspiracy among defendants to fix manufacturers' book prices.

Discussion

Counsel have been charged by the Court with the responsibility of devising a workable method for trial of these cases before a jury which will fully and finally determine the issues in a manner which is not only fair to both sides, but also manageable by the Court and comprehensible by a jury. Plaintiffs have submitted a trial proposal which completely ignores the legal distinctions between the causes of action they have alleged and overlooks fundamental elements of the proof of these causes of action. The present trial proposal is an attempt to meet the needs of the Court and of the jury while at the same time respecting the substantive legal requirements of the antitrust laws. In making this proposal, defendants Ilco Corporation and Eaton Corporation join defendants Sargent & Company and Emhart Corporation in vigorously opposing plaintiffs' motion for separation of the so-called "liability" and "damage" issues, and adopt defendants' joint memorandum in opposition thereto.

Plaintiffs have alleged two separate and distinct horizontal conspiracies, each requiring different quanta and kinds of proof as to both the liability and damage issues. They have alleged, first, a horizontal conspiracy among defendant manufacturers to fix manufacturers' list prices and, second, a horizontal conspiracy among defendant manufacturers and multiple conspiracies among defendant manufacturers and their respective distributors to impose vertical restrictions on their distributors.

It is apparent from their Summary of Evidence that plaintiffs believe that the horizontal price-fixing conspiracy among defendant manufacturers presents a case which is capable of being defined, isolated, tried and determined to a conclusion, including assessment of damages in a precise amount. It is equally clear

that the gravamen of this alleged conspiracy was the fixing only of the prices at which all manufacturers sold to the distributors, that is, the manufacturers' book price. On the other hand, the separate, distinct multiple conspiracies between and among all the manufacturers and all the distributors would have the result of affecting and infecting the distributors' prices and would have no effect on the manufacturers' book prices.

The evidence required to prove the first kind of conspiracy is entirely different from the evidence required to prove the second, not only as to whether there were technical violations of the antitrust laws but particularly with respect to the proof of the impact of any such violations on the plaintiffs. Only as to the alleged horizontal price-fixing conspiracy are there issues of law and fact common to all plaintiffs which could be resolved on a manageable basis in a single trial. The same evidence to establish a price-fixing conspiracy would be offered whether the plaintiff was the State of California or the State of Connecticut.

On the other hand, proof of vertical restrictions in Connecticut would be entirely different from proof of vertical restrictions in California. Similarly, proof of the impact of such vertical restrictions, in contrast to proof of the impact of prices raised and fixed by operation of a horizontal book price conspiracy, necessitates transaction by transaction analysis, which will vary according to the purchasing and marketing practices of purchasers on each level of the chain of distribution as well as the facts and circumstances of each bidding situation. Defendants' Memorandum in Opposition to Plaintiffs' Rule 42 Motion demonstrates not only that plaintiffs must prove the impact of the antitrust violation but that, in the context of vertical restrictions, that impact must be proved on a transaction by transaction basis and that there can be no uniform impact of such a conspiracy.

Plaintiffs' memorandum admits the extremely complex marketing relationships between each of the defendants and its distributors, as well as the peculiar relationships between the plaintiffs and contractors who erected buildings for them. In spite of these acknowledgements of highly complicated inter-relationships, plaintiffs state simplistically not only that the issues are capable of separation into liability and damages but that "if plaintiffs establish the horizontal agreement ... to fix prices and eliminate competition on master key jobs, the computation and assessment of damages would not require examination of each vertical arrangement by which defendants implemented their conspiracy." (Plaintiffs' Suggestions Regarding Procedures for Trial, page 9). On the contrary, as defendants have pointed out in their Memorandum in Opposition to Plaintiffs' Rule 42 Motion, examination of each vertical arrangement, and each individual transaction, is necessary to establish not only damages but also liability.

It is this substantive requirement of proving the individual impact of vertical restrictions, with the inevitable proliferation of proof of transaction after transaction, that renders the trial of these cases according to the plaintiffs' trial proposal impractical if not impossible and requires the parties to find an alternative means to permit the trial of these cases in an orderly, manageable fashion which will allow proper presentation of the claims and defenses which can be understood and dealt with by the jury and the Court. Indeed, defendants contend that the so-called vertical conspiracy cases do not admit of manageable trial on a class action basis and for that reason should be dismissed.

Defendants have pointed out that the questions of impact in a horizontal price fix case are totally different from those in a complex horizontal and vertical case and that the need for transactional analysis of impact is not present in the former case. (Defendants' Memorandum in Opposition to Plaintiffs' Rule 42 Motion, pp. 29-30). Conversely, defendants have also pointed out the legal requirement of such analysis in a vertical conspiracy and indicated the nature of the analysis which would be required in this case. (Defendants' Memorandum in Opposition to Plaintiffs' Rule 42 Motion, pp. 9-28). Defendants Exxon and Ilco submit that the requirement of such extensive and detailed analyses renders the trial of the vertical conspiracy allegations in these cases totally unmanageable on a statewide class action basis for the same reasons set forth by defendants in their opposition to national class certification. (Defendants' Memorandum in Support of Their Motion for Denial of Class Certification, pp. 10-24).

Indeed, this Court itself recognized that "insuperable problems of class action management might make pretrial dismissal of certain claims appropriate (citation omitted)." (Ruling on Motion for Summary Judgment, August 23, 1973, p. 6, n. 6). Even more recently the Court acknowledged that "it would be too difficult to manage if you have to take each particular job and figure out what the damages are in each particular job, at each particular time." (Hearing on Defendants' Motion Pursuant to Rule 37(a), September 30, 1974, p. 32). Because this is exactly what would be required to establish liability and damage arising from agreements to impose vertical restrictions, these issues simply cannot be managed on a class action basis and should be dismissed. Trial of these

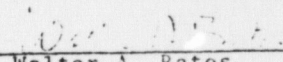
myriads of claims would lead inevitably to distortion of the issues, uncorrectable confusion of the jury and completely unjustifiable usurpation of the time of the Court.

For these reasons, defendants Ilco and Eaton submit that separation and trial of the horizontal book price-fixing conspiracy is the only viable method of accomplishing the expeditious and orderly disposition of this litigation in a manner which will avoid unfair prejudice to defendants and will assure substantial justice.

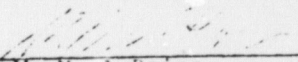
SUMMARY

In summary, then, the trial proposal of defendants Ilco and Eaton is that the Court and the jury hear and determine all of the evidence offered to prove the existence of a "contract, combination or conspiracy" fixing the price at which the manufacturers sold their hardware to their distributors. In the same trial, the Court and jury would hear and determine any evidence offered by plaintiffs to prove the impact, if any, of such a horizontal book price conspiracy on the amount paid by any plaintiff for any hospital, school, college, or other public building, which of necessity would include a determination of the issues of "pass-on" and fraudulent concealment. Finally, the Court and jury would hear and determine the exact amount of damage, if any, sustained by any plaintiff on account of any such hospital, school, college or other public building.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Separate Class Action and Trial
Proposal of Defendants Eaton Corporation and Ilco Corporation was
mailed this day of , 1975, to counsel on the attached
Service List of Counsel.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

IN RE: :
MASTER KEY ANTITRUST : M.D.L. DOCKET NO. 45
LITIGATION : ALL CASES

RULING ON PENDING MOTIONS

This litigation, consolidated under the multidistrict procedures for pretrial proceedings in this district, involves antitrust claims by purchasers of master key systems against four defendant manufacturers. The cases have been summarized before, see In re Master Key Antitrust Litigation, M.D.L. No. 45 (D. Conn. Aug. 22, 1973), reported at 1973-2 Trade Cases ¶ 74,680, and familiarity with them will be presumed here.^{1/} Two major motions are presently awaiting decision. The

^{1/} It may be useful, however, to set out for the record a clarification of the plaintiffs' claims which has now occurred. First, they claim a conspiracy among the four defendants to fix prices. Second, they claim that a horizontal conspiracy existed among the defendants to eliminate inter- and intra-brand competition among their dealers, thus keeping prices above competitive levels. This conspiracy was allegedly implemented by a series of illegal vertical restrictions. The damage claims arise from the horizontal, not the vertical, conduct. Thus the plaintiffs plan to prove illegal vertical restrictions upon the dealers only to demonstrate by implication the existence of a horizontal conspiracy among the defendants to reduce competition (and thus maintain prices above the competitive level) at the dealer level. The plaintiffs assert that they therefore need not and will not introduce evidence as to all of the illegal vertical restrictions they claim to have discovered. See Transcript of Hearing, Jan. 27, 1975, at 10-23.

defendants have moved to set aside the provisional class certification long ago entered in two of these cases, see City of Philadelphia v. Emhart Corp., 50 F.R.D. 232 (E.D. Pa. 1970), and to have class certification denied in those cases in which the issue has not been ruled upon. The plaintiffs have moved to transfer those cases not presently in this district for all purposes to this court and to consolidate all of the cases for trial, see 28 U.S.C. § 1404(a) (1970); Fed.R.Civ.P. 42(a). Further, the plaintiffs seek to separate the trial into two stages--the first to prove liability; the second to show damages--see Fed.R.Civ.P. 42(b).

I. Class Certification

The rules for certification of a class action of this sort are by now well known. The factors analyzed below track the requirements contained in Fed.R.Civ.P. 23(a), (b)(3).^{2/}

There is no question but that the classes here are so numerous as to render joinder of all the members impractical. Fed.R.Civ.P. 23(a)(1). But the defendants argue that almost none of the other class action requirements are satisfied. Fed.R.Civ.P. 23(a)(2) requires that there be questions of law or fact common to the class; Fed.R.Civ.P. 23(b)(3) requires that these common questions predominate over those not common

^{2/}

Re the inapplicability of Fed.R.Civ.P. 23(b)(2), see, e.g., Ungar v. Dunkin' Donuts of America, Inc., 1975 Trade Cases ¶ 60,204 (E.D. Pa. 1975), at 65,780-81.

to the class. In these cases the common questions are certainly central at least on the issue of liability. The plaintiffs' claims all go to group conduct by the defendants. It is true, as the defendants urge, that there may be local variations in marketing practices and the like. It is also true that in order for all the plaintiffs to recover it must be shown that the effects of the defendants' alleged anti-competitive behavior extended to all the areas in which plaintiffs made master key purchases. But these facts do not change the central and common element of these cases--the question whether the defendants acted in concert to decrease competition among them. If this element is shown, differences in the way the plan was manifested around the country are unimportant, except perhaps as they may affect the amounts of recovery different plaintiffs may obtain. Nor does this last qualification militate against class certification; in few class actions is there a simple per capita measure of recovery. Here the differences may be due to different conduct of buyers and sellers (as opposed, perhaps, to differences only among buyers in some other class actions). But the differences in damage recoveries may be handled by splitting the trial into liability and damage components, as discussed infra. And the proper inquiry in certifying a class for purposes of trying liability is simply whether common issues predominate as to the liability issue. See Ungar v. Dunkin' Donuts of America, Inc., 1975 Trade Cases ¶ 60,204 (E.D. Pa. 1975), at 65,784,

and cases cited therein. As to this inquiry, I hold that the common issues predominate.^{3/}

The last requirement of Fed.R.Civ.P. 23(a) is that the representative parties adequately protect the interests of the class.^{4/} The defendants do not challenge the allegations

^{3/} The defendants argue that there is no liability without injury, and that a crucial element of the plaintiffs' case will, therefore, be proving damage. The argument continues: as the complexities of showing damage to each plaintiff are involved at the liability stage, it may be seen that common issues do not predominate even as to this portion of the case.

I believe this classic defense argument, cf. "Eisen IV, Class Actions One Year Later," 711 ATRR, Apr. 29, 1975, at B-1, B-4, to be a red herring, notwithstanding its acceptance by some courts. See, e.g., In re Transit Co. Tire Antitrust Litigation, 1975 Trade Cases ¶ 60,144 (W.D. Mo. 1975), at 65,418-19. If the plaintiffs introduce proof (or if it may be stipulated) at the liability stage that they bought master key systems and that the defendants engaged in a pervasive nationwide course of action that had the effect of stabilizing prices at supracompetitive levels, the jury may conclude that the defendants' conduct caused injury to each plaintiff. The amount of that injury may be computed at a separate trial on the damage issues. Cf. Aamco Automatic Transmissions, Inc. v. Tayloe, Civ. No. 73-391 (E.D. Pa. Apr. 18, 1975), at 14. From the excerpts of transcripts provided me by the plaintiffs it appears that Judge McGarr has adopted a similar position in the Automobile Fleet Discount Cases, M.D.L. No. 65 (W.D. Ill.), as did Judge Sirica in the Ampicillin Antitrust Litigation, 55 F.R.D. 269, 275-76 (D. D.C. 1972).

^{4/} Fed.R.Civ.P. 23(a)(3) requires that the claims of the representative parties be "typical" of the class. However, this requirement adds nothing to the other requirements of rule 23(a). See Ungar v. Dunkin' Donuts of America, Inc., 1975 Trade Cases ¶ 60,204 (E.D. Pa. 1975), at 65,781; 3B J. Moore, Federal Practice ¶ 23.06-2 (Rel. No. 8) and cases cited therein. Thus such facts as that some of the representative plaintiffs are located in eastern cities while members of the class are located in the plains states are irrelevant if they do not have significance under one of the other clauses of rule 23.

of the various states seeking class certification that they are proper representatives of their political subdivisions and agencies,^{5/} with the exception that they reraise the "pass-on" defense. I have earlier explicated and rejected this defense as applied to most of the issues here presented,^{6/} see In re Master Key Antitrust Litigation, M.D.L. No. 45 (D. Conn. Aug. 22, 1973), and I adhere to that ruling here.

It is the two national class actions to which the defendants address most of their objections.^{7/} They argue that the City of Philadelphia, which seeks to represent all otherwise-unrepresented public entities who are ultimate purchasers of master key systems, bought a lower percentage of master key extensions than a number of other public entities. They also object to Philadelphia, a populous eastern city, representing sparsely settled plains states, inter alia. I do not find these distinctions compelling, at least to the extent that they are addressed to the liability issues in that case. Philadelphia, having purchased some master key

^{5/} See, e.g., Illinois v. Harner & Row Publishers, Inc., 301 F. Supp. 484 (N.D. Ill. 1969).

^{6/} To the extent that the plaintiffs' contractors, who built the structures incorporating the master key systems, can be shown to have absorbed any of the amount by which the defendants' prices exceeded the price level that would have existed absent illegal conduct, the plaintiffs' damages may be reduced.

^{7/} The purported class action brought by Bermar Construction Corp. has been conditionally dismissed by order of the court and will not be considered further.

extensions, surely has standing to press a claim as to overcharges on such products. And the lower percentage creates no conflict of interest between Philadelphia and the class it seeks to represent. All share an interest in proving that the defendants conspired to stabilize prices at a supracompetitive level. Similarly, the geographic differences are not compelling, for what is at issue is the existence of a national conspiracy, as effective in Wyoming as in Philadelphia.^{7A/}

The defendants' objections to Amherst Leasing as the representative party for a national class of private builder-owners are also unconvincing. The fact, offered as an objection by the defendants, that Amherst Leasing bought mostly locksets for high-rise buildings seems totally insignificant; there is no indication that the alleged conspiracy operated differently with respect to master key systems for high-rise buildings than with respect to systems for other sorts of buildings. Nor are the particular buying practices of Amherst Leasing relevant to the existence of this conspiracy; if they are relevant at all, it is only as to the damages recoverable.

The defendants also object to Amherst Leasing's representation of this large class because of speculation that it will not be willing to bear the cost of the notice to the class required by Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). In an earlier ruling I held that Samuel Lefrak, the head of Amherst Leasing's parent organization, could be deposed

^{7A/}

The City will, of course, be required to provide notice of this action to all reasonably ascertainable members of the class. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). If any of those noticed have any reservations about the adequacy of representation by the City of Philadelphia, they need not remain part of the class.

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as to its ability and willingness to absorb the costs of representation in this suit, see Amherst Leasing Corp. v. Emhart Corp., 65 F.R.D. 121 (D. Conn. 1974), and that deposition has now taken place. It may be that the defendants will be able to show that Lefrak is unwilling for Amherst Leasing to bear such a burden; they have requested leave to file a supplementary brief on this issue once they have the transcript of Lefrak's deposition. Absent that event, however, I am willing to notice that this plaintiff is a large company that is capable to representing the class if it wishes to, and that it has done so capably until now. Therefore I reject the defendants' objections, giving them leave to renew the class certification issue as to Amherst Leasing if Mr. Lefrak's deposition provides grounds to do so.

Rule 23(b)(3) requires that for a case to be maintained as a class action the court must find that litigation in any other posture would not be superior. The issue most relevant to superiority of the class actions here is manageability;^{8/} the defendants say that this litigation is simply not

^{8/} Rule 23(b)(3) makes several matters pertinent to a finding of superiority which are not really in issue here: the interest of members of the class in individually controlling the litigation and the extent and nature of other suits concerning this subject matter already commenced. As to the advantage of concentrating the litigation in this forum, I find Judge Napoli's opinion on the issue of whether to transfer several of these cases to this district persuasive. See Connecticut v. Eaton, Towne & Yale, Inc., No. 70 C 591 (N.D. Ill. Nov. 10, 1970). He found compelling advantages in keeping the several cases with which he was dealing together, transferring them all here. I agree that this litigation should be disposed of as a whole rather than in bits and pieces.

manageable. Their argument is largely based upon the position, rejected in note 3 supra, that a particularized showing of some damage to each plaintiff is an integral part of the liability issue. I will not repeat the refutation of that position here. I see no insurmountable management problems with these cases, a conclusion supported by the smooth conduct of the extensive and complex pretrial proceedings to date. Cf. Automobile Fleet Discount Cases, M.D.L. No. 65 (N.D. Ill. Feb. 28, 1975). Nor do I find that any other method of proceeding in this litigation would be superior to maintenance of these class actions.

Thus I adhere to Judge Wood's earlier certification of these classes, denying the defendant's motion and granting the outstanding plaintiff motions for class certification. An important proviso to this ruling, however, is that it is based almost entirely on considerations relevant to the liability, not the damage, issues in these cases. Decertification or certification of different classes remains possible for purposes of whatever damage determination may be called for at a later date.

II. Consolidation of Cases and Separation of Issues

Rule 42(a) provides that this court may consolidate all cases before it involving a common question of fact or law. In order to get all these cases before this court for all purposes, the plaintiffs have moved to have those cases still

on the dockets of other districts transferred here.^{9/} As the multidistrict transferee court, I have the authority to rule on such a motion. See, e.g., Pfizer, Inc. v. Lord, 447 F.2d 122 (2d Cir. 1971); Rule 15(b), Rules of Procedure of the Judicial Panel on Multidistrict Litigation. Under 28 U.S.C. § 1404(a) (1970) these cases may be transferred here if they might have been brought in this district originally. As all of the defendants have admitted being present in Connecticut, this requirement is satisfied. See 15 U.S.C. § 15 (1970). The other prerequisite to transfer is that it be in the interest of justice and for the convenience of parties and witnesses. In one of the suits already in this district for all purposes pursuant to a § 1404(a) transfer, it was the defendants who sought the transfer with just such considerations in mind. Judge Napoli ruled that justice would be served by a transfer, Connecticut v. Eaton, Towne & Yale, Inc., No. 70 C 591 (N.D. Ill. Nov. 10, 1970). I agree. Therefore all cases not presently in this district for all purposes, except those brought by the State of Florida and the City of New York, are ordered transferred here. Because the cases involve common issues of law and fact, they are also ordered to be consolidated under Fed.R.Civ.P. 42(a).

9/

The State of Florida and the City of New York have not joined in this motion. If they choose not to present such motions, their cases must be remanded to the districts from whence they came at the conclusion of pretrial proceedings.

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The remaining issue is posed by the plaintiffs' request, pursuant to Fed.R.Civ.P. 42(b), to conduct separate trials of the liability and damage stages of these consolidated cases. This is a common tool for dealing with complex litigation such as this. See, PLI, Class Actions 1975, at 53-55 (Litigation Course Handbook Series No. 71) and cases therein. And, as I have indicated above, the idea seems a good one for these cases as well. The proof that will be introduced as to the liability issues is in large part common to all the plaintiffs. The proof as to damages is likely to be much more individualized. Indeed, the damage component of this litigation, if we must reach it, may be easily resolved only by reference to a special master or through a long series of separate minitrials, one for each plaintiff. Thus, it seems eminently sensible to postpone both further discovery and trial of the damage claims until it is ascertained that the defendants will be liable for some amount.^{10/}

The defendants' major objection to this course of action rests on their argument that a particularized showing of damage to each plaintiff must be an element of the liability trial. If this position were accepted, separate trials as requested by the plaintiffs would simply involve duplicative

^{10/}

It also seems sensible to postpone determining the exact procedure that will be followed at the damage stage until it is certain that there will be such a stage and until enough discovery as to damages has been had that the parties are better able to inform the court of the best procedure to follow.

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introduction of damage evidence in each and would accomplish nothing. However, I have not accepted the premise of this argument. See note 3 supra. Therefore I remain convinced that separate trials will be more efficient than a single trial of both liability and damage issues.

The defendants' other objection to splitting the liability trial from the damage determination is that this procedure will preclude the use of the same jury for both stages, in violation of the seventh amendment to the Constitution. Cf. United Air Lines, Inc. v. Wiener, 286 F.2d 302 (9th Cir.), cert. denied, 366 U.S. 924 (1961). The constitutional question turns on whether "the issue to be [tried to a second jury] is so distinct and separable from the others that a trial of it alone may be had without injustice." Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494, 500 (1931). Here the distinctness of the damage issue seems clear. At the liability stage it will be determined whether the defendants' conduct included violations of the antitrust laws and whether it affected prices. The proof of the alleged conspiracy and of liability to the plaintiffs will be possible without detailed reference to damages, as set out in note 3 supra. Similarly, proof of damages suffered will be possible without detailed reference to liability issues: the issues at this stage will be what the plaintiffs paid for their master key systems and what they would have paid if the defendants had refrained from specific conduct earlier found to be illegal.

Thus I find the defendants' constitutional objections unpersuasive and order that separate trials be held on the issues of liability and damages. Cf. Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16 (5th Cir. 1974); Swofford v. B & W, Inc., 336 F.2d 406, 415 (5th Cir. 1964), cert. denied, 379 U.S. 962 (1965); LoCicero v. Humble Oil & Refining Co., 52 F.R.D. 28 (E.D. La. 1971). It is

SO ORDERED.

Dated at Hartford, Connecticut, this 27th day of May, 1975.

M. Joseph Blumenfeld
M. Joseph Blumenfeld
United States District Judge

AUG 11 3 24 PM '75

U.S. DISTRICT COURT
HARTFORD, CONNECTICUT

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

IN RE:	:	
	:	M.D.L. DOCKET NO. 45
MASTER KEY ANTITRUST	:	
LITIGATION	:	<u>ALL CASES</u>

RULING ON MOTION FOR
CERTIFICATION OF INTERLOCUTORY APPEAL

May 27, 1975, a number of pending motions in this litigation were ruled upon. The plaintiffs were successful in all respects. Two nationwide classes and numerous state-wide classes were provisionally certified; all but two of the cases that make up this multidistrict litigation were transferred to this district for all purposes and consolidated; separate trials on the issues of liability and damages were ordered; further discovery as to damages was postponed until completion of the trial of the liability issues.

The remaining defendants,^{1/} over the objections of the plaintiffs, now seek a modification of the opinion of May 27 to include a certification of two questions for immediate appeal. See 28 U.S.C. § 1292(b):

"When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question

^{1/} Emhart Corp. has entered into a settlement agreement with the plaintiffs that is in the process of being formally executed by all parties.

of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. . . ." 2/

The appropriateness of this certification procedure for resolving issues of class certification and consolidation has recently been emphasized by the Second Circuit. See Parkinson v. April Industries, Inc., Dkt. Nos. 74-2058, 74-2214 (2d Cir. June 30, 1975), at 4475 & n.5 (majority opinion), 4485 (Friendly, J., concurring). See also Katz v. Realty Equities Corp., Dkt. Nos. 74-2053 to -2054 (2d Cir. June 30, 1975).

The first question that the defendants seek to have certified is whether particularized "impact" must be shown as an element of establishing liability. Cf. 15 U.S.C. § 15. The defendants' argument was rejected in the May 27 ruling, which held that a generalized showing of injury was sufficient. If the defendants are correct, the validity of two conclusions necessary for the class certifications entered--that common issues predominate over individual issues and that trial of the case as a class action would be manageable--would be open to serious question. Cf. Ungar v. Dunkin' Donuts of America, Inc., 1975 Trade Cases ¶ 60,361, at 66,537

2/

Section 1292(b) provides for certification of interlocutory appeals of certain orders "not otherwise appealable." It is somewhat anomalous that the defendants seek such certification, for they have also filed a notice of appeal and thus contend that the ruling is directly appealable.

(E.D. Pa. Apr. 8, 1975). In addition, the utility of separate trials of liability and damage issues would be nil, as explained on pages 10-11 of the ruling of May 27. Thus the defendants' first question is "serious to the conduct of the litigation," Katz v. Carte Blanche Corp., 496 F.2d 747, 755 (3d Cir.), cert. denied, 419 U.S. 885 (1974), and thus may be characterized as "controlling" within the meaning of § 1292(b). Moreover, the split among the courts who have considered this issue, indicated at note 3 of the May 27 ruling, establishes that "there is substantial ground for difference of opinion."^{3/}

^{3/}

Since the May 27 ruling the Supreme Court has spoken in a way that seems to support my conclusion. In Goldfarb v. Virginia State Bar, 43 U.S.L.W. 4723, 4727 (U.S. June 16, 1975), a Sherman Act case, the Court considered the particularity of the proof needed to show the jurisdictionally required effect on interstate commerce:

"The fact that there was no showing that home buyers were discouraged by the challenged activities does not mean that interstate commerce was not affected. Otherwise, the magnitude of the effect would control, and our cases have shown that, once an effect is shown, no specific magnitude need be proved. E.g., United States v. McKesson & Robbins, Inc., 351 U.S. 305, 310 (1956). Nor was it necessary for petitioners to prove that the fee schedule raised fees. Petitioners clearly proved that the fee schedule fixed fees and thus 'deprive[d] purchasers or consumers of the advantages which they derive from free competition.' Apex Hosiery Co. v. Leader, 310 U.S. 469, 500 (1940). See United States v. Socony-Vacuum, 310 U.S. 150 (1940)."

The Supreme Court's logic is similar to that in note 3 of the May 27 opinion. However, the Court was addressing a different issue, and I cannot find its language so closely analogous to

It is the third requirement of § 1292(b)--"that an immediate appeal from the order may materially advance the ultimate termination of the litigation"--that in my opinion is not met here. This litigation is now nearing trial as to the liability issues: plaintiffs' counsel have asked for a trial date this fall. Discovery has been ongoing for years and is at or near the point of completion. The class notices are being readied for mailing this summer. It is within the realm of possibility that a decision may be entered this year.

In the face of such progress it can be merely dilatory to permit an interlocutory appeal. No matter how the Second Circuit might resolve the question raised by the defendants, a trial would have to go forward thereafter. And the vigor with which the parties have contested each point in the litigation to date makes it likely that an appeal would eventually be taken by the losing side. On the other hand, if no appeal is allowed now, one will probably be taken after the trial. If I am reversed on the question raised by the defendants a new trial might be required.^{4/} The trade-off,

3/ cont'd "

this litigation as to destroy the "substantial ground for difference of opinion" found here.

At least one more lower court has upheld the defendants' position since my ruling. See San Antonio Tel. Co. v. American Tel. & Tel. Co., No. SA-72-CA-330 (W.D. Tex. June 23, 1975), reported in 721 ATRR, July 8, 1975, at A-16.

^{4/} Of course, a new trial might result even if the May 27 ruling were correct if some other error were to occur. However, this possibility is not relevant to the present discussion.

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then, is one trial and two appeals the defendants' way, or one appeal and one trial if no appeal is allowed now and the May opinion was correct; one appeal and two trials if no appeal is allowed now and the May opinion was wrong. Especially given the proximity of the litigation to trial, I think that the latter road is shorter. Section 1292(b) puts it within my discretion to travel the path to immediate trial.

The second question as to which certification is sought is whether the separation of damage and liability issues for trial violates the defendants' rights under U.S. Const. amend. VII (trial by jury). The first premise of this question is that the split trial procedure will preclude the use of the same jury for both stages; the second premise is that the issues are so interwoven that trials before different juries would be unjust. See Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494, 500 (1931); United Air Lines, Inc. v. Wiener, 286 F.2d 302 (9th Cir.), cert. denied, 366 U.S. 924 (1961). The constitutional argument was rejected in the May 27 ruling.

This question is clearly inappropriate for interlocutory appeal. First, its premise that separate juries will be necessitated is not established.^{5/} Thus the Court of Appeals would be asked to resolve a still speculative issue,

^{5/} In the May 27 ruling this premise was accepted arguendo; the opinion went on to hold that even if separate trials were needed, no infringement of the defendants' constitutional rights would result.

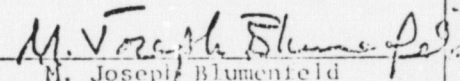
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which would be an unwarranted imposition upon its crowded docket. Until the issue becomes fixed, it can hardly be said to be "controlling" within the meaning of § 1292(b). Second, the extent of interrelationship between the issues separated for trial is a peculiarly factual matter. To be sure, the answer to the constitutional question is necessarily "legal"--the application of the law to the facts. However, the basically factual nature of the inquiry militates against certifying this as a "controlling question of law" within the meaning of § 1292(b). Third, it is not clear that a "substantial ground for difference of opinion" exists. The plaintiffs have cited numerous cases using split trials before different juries in various factual circumstances, which tends to establish that the degree of interrelationship between the separated issues must be quite high in order to violate the Constitution. The defendants have come forward with scant precedent to the contrary.

In view of the foregoing, the defendants' motion to certify issues for interlocutory appeal ought to be denied. It is

SO ORDERED.

Dated at Hartford, Connecticut, this 11th day of August, 1975.


M. Joseph Blumenfeld
United States District Judge

EXCERPTS FROM TRANSCRIPT OF DEPOSITION OF
ANTHONY SCAVO, VICE PRESIDENT IN CHARGE OF
CONSTRUCTION FOR THE LEFRAK ORGANIZATION,
INC., PARENT CORPORATION OF AMHERST LEASING
CORPORATION, ET AL, PLAINTIFFS

P. 13 Q [by Charles Donelan, Esq.] Do you mean by that that there is a policy that someone else in the company would make that purchase (p. 14) and determine what kind [of hardware] it was or what do you mean by that policy?

A Well, I -- I have to explain something I suppose about hardware.

Q Please do.

A Usually hardware is a relatively insignificant part of a cost of the entire job. It is very minimal. It may be a very small percentile. Maybe not even a percentile. Maybe to give you a number, .25 of one percent.

And usually if you buy hardware of a certain supplier or distributor, it becomes repetitive because you need replacements, and more or less you get locked in after awhile with one distributor.

Q When you say you usually get locked in with one distributor, let me ask you to elaborate on that a little further exactly what you mean by that.

A Well, for instance -- I suppose it's difficult to explain. But you start off in construction -- let's assume you start from initial phase, initial job. The building is the first building he ever built, right?

He has to buy hardware for it. So he buys and he finally decides this is the type I'm going to use, the company I'm going to use, and he buys it.

As I said, the price of the hardware in (p. 15) relation to the entire price of the project is very, very, very minor. And he goes to the next building, and if he maintains his building and keeps them and doesn't sell them and has a management responsibility, he's faced with a couple of problems.

If he does not -- if he goes to a different company -- a different company's material --

Q A different lock company, you mean?

A A different lock company, he has to replace -- on the initial building, he is going to pay an exorbitant amount or it is difficult to obtain a replacement lock, etc. So he ends up repeating the same supplier simply because it is convenient and it is relatively unimportant in cost.

Q To make sure that I understand, this decision to continue with one brand once a satisfactory relationship has been established is the decision of the builder or purchaser?

MR. MONTAGUE: I object to the form of that question. I don't think that's what he said.

A It's more or less mandatory to do so.

Q Why is it mandatory?

A Well, suppose if you acquire several buildings (p. 16) and locks are not permanent -- they do breakdown -- they do have to

be changed -- you do not want to have all of a sudden one apartment with one set of hardware and another apartment with another set of hardware. You want to have them uniform. So you basically have to replace the hardware. It may not be readily available and it may cost that one set or three sets or ten sets or 20 sets you have to replace, it may become extremely expensive.

So it pays to try to maintain the same relationship with the same supplier and manufacturer.

* * *

P. 22 Q How does builder's hardware get purchased by Lefrak?

A Well, the Lefrak Organization prior to my being there had purchased and used in a majority of their buildings Lockwood Hardware. I would say almost 100 percent of the time.

I have to add to something I said before. Also in an apartment house you have to understand that each lock is master keyed to a central master. So in replacement of same when the time and period occurs, that lock, if it is stolen, damaged or vandalized, has to be replaced and mastered to the building master.

To do this from anyone except the original supplier, distributor -- I'm not sure it can be done, but to be done it would be an extremely costly and difficult (p. 23) thing. So, basically, we had to stick with the Lockwood Hardware system.

Atlantic Hardware is a distributor of same and the Lefrak Organization has a history of use with them, and we tried to maintain that relationship.

Q You say prior to your arrival with Lefrak, a great deal or almost 100 percent was Lockwood Hardware which was purchased.

A That's right.

Q Did you make a change in this policy?

A No.

Q Why not?

A Well, as I said, you have to -- you have to continually replace -- need. And the master keying system has to be maintained in each of your buildings. The Lefrak Organization has a large management company and keeps all its buildings. We don't sell any.

To change companies would put a -- would have put, I think, a tremendous burden on our company. So we try to maintain a relationship.

And, as I said before, the cost of hardware in the overall cost of a project is minor. As I said, maybe .25 of one percent.

Shopping around to purchase and try to use (p.24) another distributor or different manufacturer -- first of all, to buy Lockwood, I think, in the City of New York, there are two -- the most I know of is two distributors. One is Atlantic and one, I think, is Duetcher Hardware. The price between the two is relatively the same. So obviously there is no benefit to change from Atlantic to Duetcher.

The hardware companies also -- the distributor -- excuse me -- also at the beginning of a job prepares a hardware schedule.

Q When you say hardware schedule, is that sometimes referred to as the specifications?

A Yes.

Q The hardware distributor would perform that service for you?

A Yes.

Q Is that a service to you as a builder?

A It's -- that has been done after we purchase it usually, not basically prior to the time. It's a service to us -- I suppose it really is -- you know, I've never been asked that question. It really is.

* * *

P. 32 Q Have you considered in your purchase of builder's hardware on other buildings purchasing another brand other than Lockwood?

(p. 33) A No.

Q Why not?

A Because of the master keying system and replacement system.

Q Let me change the question.

What about on a new project where it is not going to be master keyed into any prior building, have you considered another brand other than Lockwood?

A No, the problem becomes -- to change a distributor involves the same problem as I said before. If you lose a relationship, it becomes almost difficult or impossible to replace a lock

with the same master keying system. It's not impossible. That's the wrong word. More expensive. Because anything can be done obviously. It becomes extremely expensive and difficult.

Q I am talking about a new project where there is no master key installed and nothing to connect back with. Have you considered a brand other than Lockwood for that type of installation?

A Occasionally, yes.

But as I said, the differential in costs are -- the cost of a lock -- to buy locks and hardware is so minimal that this relationship -- that you must try and maintain this relationship. Because if I went to a (p. 34) different manufacturer, I would not have my relationship with Lockwood and Atlantic Hardware.

Then if I asked them to replace something or to give me a replacement, I can more or less with my present relationship get an established price and no difficulty. Once I break the relationship, it's going to put me in an untenable position to replace things, in cost and whatnot.

And as I said, the cost of hardware per apartment, you're talking about a range -- a dollar range -- in today's market -- I'll give you an approximate figure -- maybe in a 60 to \$70 range per apartment. It's not worth an effort.

* * *

P. 37 Q We have talked about alternate sources of supply and you told us that you or someone contacted Duetcher sometime ago.

Did you understand that answer, your answer to apply not only to apartment buildings but office buildings as well?

A No, I thought it applied just to apartment buildings.

Q Have you since you have been with Lefrak contacted any other bidders, hardware distributors other than Atlantic for builder's hardware for office buildings?

A No.

Q Do you know if anyone under your supervision or control has contacted any other builder's hardware distributor other than Atlantic for office buildings?

A No, I don't know.

Q Is there one particular person in the Lefrak Organization now aside from yourself who deals directly with Atlantic Hardware?

A All my project managers do.

Q Do you have direct contact with Atlantic Hardware?

A Yes.

(p. 38) Q What person do you --

A Sam Goldstein, the principal.

Q Does Mr. Goldstein have a title, do you know?

A I don't know his title. I know he owns the organization, but I don't know his title.

Q You deal directly with Mr. Goldstein?

A Yes.

Q Would you, starting with the first instruction you get that you are going to build a building which brings you to talk about builder's hardware, tell how you purchase builder's hardware for a building or a project from Atlantic Hardware.

A Well, first I analyze the hardware schedule.

Well, let's put it -- well, I suppose first we setup a budget for a building. That's the first step. We setup a budget for a building, break it down into various trades, plans obviously are drawn, the architect draws a hardware schedule, I look it over, make any corrections.

We call Atlantic Hardware who picks it up with the corrections and submits a price. And Mr. Goldstein and I sit down and negotiate the price.

Q That's it?

A That's basically it.

* * *

P. 45 Q What geographical area does Lefrak build in?

A The metropolitan New York area, including parts of Jersey, Long Island and Westchester County.

Q When you are building a building in New Jersey, do you still purchase your builder's hardware from Atlantic Hardware?

A Yes.

Q Does the same thing apply to all of the other areas you have spoken of outside of Manhattan?

(p. 46) A Yes.

Q Have you ever had an occasion in which Atlantic Hardware has refused to quote you on a job?

A Never.

Q Has anyone from Atlantic Hardware ever tried to get you or anyone of your assistants to buy from someone else builder's Hardware?

A No. Not that I know of.

Q Would your answer be the same if I broke it down and talked about metropolitan New York, Westchester, New Jersey?

A Yes, my answer would be the same.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE:

MASTER KEY ANTITRUST LITIGATION

DOCKET NO. 75-7386

CERTIFICATION

I, William H. Prout, Jr., do hereby certify that I have on this 15th day of September, 1975, mailed, postage-prepaid, a copy of the foregoing Joint Appendix, Volumes One & Two, to Lee A. Freeman, Jr., Esq., Freeman, Freeman & Salzman, One IBM Plaza - Suite 3200, Chicago, Illinois 60611 and H. Laddie Montague, Jr., David Berger, P.A. Attorneys at Law, 1622 Locust Street, Philadelphia, Pennsylvania 19103, co-laison counsel for plaintiffs appellees.

W H Prout, Jr.

William H. Prout, Jr.

